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FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-250

In re Applications of

GLOBAL INFORMATION TECHNOLOGIES, INC.	File No. BPCT-861219KG
TEXSTAR COMMUNICATIONS, LTD.	File No. BPCT-870212KM
FRONTIER BROADCASTING, INC.	File No. BPCT-870212KN
FREDERICKSBURG CHANNEL 2	File No. BPCT-870212KP
HAL S. WIDSTEN	File No. BPCT-870212KT
STONEWALL BROADCASTING, INC.	File No. BPCT-870212KU

For Construction Permit
For a New Television Station
Fredericksburg, Texas

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 1990; Released: July 30, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has before it a pleading styled "Motion For Leave To Appeal," filed June 13, 1990, by TexStar Communications, Ltd. Essentially, TexStar seeks leave from the Board, ostensibly pursuant to Section 1.301(b) of the Commission's Rules, 47 CFR §1.301(b), to appeal the Board's *Memorandum Opinion and Order*, 90R-40, released June 9, 1990, which remanded this proceeding (which was then before the Board on exceptions) to the Administrative Law Judge (ALJ) on a financial issue against TexStar. TexStar contends that immediate review is imperative, since the Board's *Order*, in effect, adopted a financial standard at odds with that already established by the Commission. An opposition was filed on June 22, 1990 by Fredericksburg Channel 2. TexStar filed a motion to strike the opposition on July 3, 1990.

2. We will deny the motion. 47 CFR §1.301 governs appeals from interlocutory rulings of ALJ's, not the Board. Review Board rulings are governed by Section 1.115(e)(1) of the Rules, 47 CFR §1.115(e)(1), which states that "[a]pplications for review of interlocutory rulings made by the Review Board . . . shall be filed *only* as part of the application for review of the Board's *final decision*. " (Emphases added). Thus, the relief requested by TexStar is not available under 47 CFR §1.301 and is barred under 47 CFR §1.115(e)(1). Moreover, to the extent that the Board is empowered with discretionary authority to certify any matter to the Commission for review (*see* Section 0.363 of the Commission's Rules, 47 CFR §0.363), TexStar has not presented any colorable grounds to justify certification. [1]

3. ACCORDINGLY, IT IS ORDERED, That the Motion to Strike, filed July 3, 1990, by TexStar Communications, Ltd. IS DENIED; and

4. IT IS FURTHER ORDERED, That the Motion For Leave to Appeal, filed June 13, 1990, by TexStar Communications, Ltd. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

FOOTNOTE

[1] TexStar contends in its motion that where an applicant, such as itself, is relying on a loan from a lending institution to establish that it is financially qualified, the Commission's financial standard requires only that the bank has a "present firm intention to make [the] loan, future conditions permitting," citing *Merrimack Valley Broadcasting, Inc.*, 82 FCC 2d 166, 167 (1980); *see also Scioto Broadcasters*, FCC 90R-58, adopted June 22, 1990. We agree, and our remand *Order* does not suggest otherwise.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 88-373

In the Matter of

Amendment of Part 90 of the Commission's Rules to Permit Business Radio Use of Certain Channels in the 150 MHz Band — RM-6276

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 9, 1990; Released: July 30, 1990

By the Commission:

I. INTRODUCTION

1. On July 13, 1989, we adopted a *Report and Order* in the above captioned proceeding that amended Part 90 of the Commission's Rules, 47 C.F.R. Part 90, to permit Business Radio Service and Taxicab Radio Service licensees increased use of frequencies in the 150 MHz band.[1] We have received three Petitions for Partial Reconsideration (Petitions) of specific aspects of the *Report and Order*.[2] These petitions argue that we should (1) create additional offset channels in the 150 MHz band, (2) permit increased power on two additional Business Radio paging frequencies, (3) discontinue use of the 1950 Census for assigning certain frequencies shared between the Business and Taxicab Radio Services, (4) change four of the frequencies assigned to the Taxicab Radio Service, (5) specify five different Business Radio paging frequencies in Puerto Rico and the Virgin Islands, (6) limit the transmitter power on the newly designated offset frequencies utilized by the Business Radio Service to 110 watts, and (7) permit two-frequency operation on the new Business Radio Service frequencies that are adjacent to Taxicab Radio Service frequencies.

2. For the reasons that follow, we deny the petitions on the two issues with respect to (1) creating additional offset channels in the 150 MHz band, and (2) discontinuing use of the list of designated Standard Metropolitan Areas (SMAs) derived from the 1950 Census data in assigning certain shared frequencies in the 150 MHz band. On the five other matters, however, we find that the public interest would be served by a modification of the rules adopted in the *Report and Order*. Specifically, we will (1) designate different 150 MHz offset channels than specified in the *Report and Order* for use by Taxicab Radio Service licensees outside of the current list of SMAs, (2) designate different 150 MHz offset channels than originally specified for paging only operations in Puerto Rico and the Virgin Islands, (3) establish a maximum transmitter output power of 110 watts for Business Radio Service licensees operating on specified channels, (4) permit increased power on an additional 150 MHz frequency currently designated for paging, and (5) change the designated use of the four 157 MHz frequencies assigned to the Business Radio Service to mobile only use.

II. BACKGROUND

3. Prior to 1971, private land mobile channels in the 150 MHz band were spaced at 30 kHz. In 1971, the Commission permitted some private land mobile radio services to use twelve channels centered between existing channels, *i.e.*, "offset channels," or channels 15 kHz adjacent to the original channels. [3] We initiated the instant proceeding in part to examine the potential for creating new offset channels adjacent to existing 150 MHz channels assigned exclusively to the Business Radio Service. We also proposed to examine several other issues concerning the 150 MHz band. These issues included whether we should remove geographic restrictions on the twelve existing offset channels, which were allocated to the Taxicab Radio Service for use in SMAs of 50,000 population or more but unallocated outside the SMAs.[4] We also asked whether we should increase permitted power on 150 MHz Business Radio Service paging channels. Finally, we asked whether we should continue to rely on the list of SMAs derived from the 1950 Census data to determine the geographic sharing of certain 150 MHz frequencies between the Taxicab and Business Radio Services.[5]

4. Following comments, we decided not to create new offset channels in the continental United States.[6] We did, however, create 21 new offset channels in Puerto Rico and the Virgin Islands and made all 21 channels available to the Business Radio Service.[7] We also decided to expand use of the twelve existing offset channels to areas outside of SMAs with populations in 1950 of 50,000 or more. We assigned eight of the channels to the Business Radio Service and four of the channels to the Taxicab Radio Service.[8] We determined not to allocate offset channels in the continental United States for high power paging nor to permit an increase in maximum power allowed on channels already reserved for paging.[9] In Puerto Rico and the Virgin Islands, however, we designated five of the newly created offset channels for high power paging.[10] Finally, we decided to continue using the list of SMAs developed from the 1950 Census data in determining the geographic sharing of certain 150 MHz frequencies between the Taxicab and Business Radio Services.[11]

III. PETITIONS FOR PARTIAL RECONSIDERATION

5. Petitioners seek reconsideration of three substantive aspects of the *Report and Order*. ITA and FIT ask that the Commission reconsider the decision not to create new offset channels adjacent to channels allocated exclusively to the Business Radio Service, because these new channels could help alleviate spectrum scarcity.[12] ITA argues that the Taxicab Radio Service needs more spectrum than it received pursuant to the *Report and Order* and that the Commission could satisfy this need by creating additional offset channels. FIT argues that, at a minimum, the Commission should create new offset frequencies and make them available outside of urban areas to the Forest Products Radio Service, which is experiencing frequency shortages in rural areas.[13]

6. NABER asks that we reconsider the decision not to permit increased power on 154.625 MHz and 157.740 MHz, two of the existing 150 MHz paging channels in the continental United States.[14] NABER believes that the frequency coordination process can work in the continental United States to control adjacent channel interference that might occur because of increased power, just as the coordination process will work in Puerto Rico and the Virgin Islands to permit high power paging on new offset channels. Thus, according to NABER, we should allow high power paging operations in the United States on the same grounds that we decided to allow it outside of the United States.[15]

7. Finally, concerning the 150 MHz frequencies that are geographically shared by the Taxicab and Business Radio Services, ITA requests that we reconsider the decision to continue using the list of SMAs developed from the 1950 Census to determine how the frequencies are shared. ITA argues that the data is very outdated.[16]

8. Petitioners also ask reconsideration or clarification concerning four technical issues. Both ITA and NABER request frequency assignments different from those made in the *Report and Order*. ITA requests that we assign Taxicab Radio Service licensees different frequencies than those designated in the *Report and Order* for use by those licensees outside of the designated SMAs. ITA indicates that assignment of the frequencies it requests will have the advantage of insulating two of the Service's four nationwide channels from interservice frequency coordination requirements that could add delay to the licensing process.[17] NABER asks that we allocate five frequencies different from those designated in the *Report and Order* as paging only frequencies in Puerto Rico and the Virgin Islands. NABER indicates that the frequencies we specified in the *Report and Order* are adjacent to currently authorized narrowband systems and that it will be impossible to use the frequencies because adjacent channel separations could not be achieved.[18]

9. NABER also asks us to clarify our Rules regarding power output limitations for Business Radio Service licensees on the eight existing offset channels which, pursuant to the *Report and Order*, will be available to Business Radio Service users outside of the designated SMAs. NABER asks that we make the same clarification regarding power output on channels that the Business Radio Service already shares geographically with the Taxicab Radio Service.[19]

10. Finally, ITA requests that we require two-frequency operation on the Business Radio Service offset channels that are adjacent to Taxicab Radio Service channels because the single frequency simplex operations used by Business Radio Service licensees are technically and operationally incompatible with the two-frequency simplex operation used by Taxicab Radio Service licensees.[20]

IV. OPPOSITIONS TO PETITIONS FOR RECONSIDERATION AND REPLY COMMENTS

11. In its Opposition to ITA's and FIT's Petitions for Reconsideration, NABER supports our decision not to create new offset channels. NABER argues that ITA and FIT have not demonstrated any need for additional spectrum and, in any event, use of the channels would be limited and would hamper the development of narrowband technology in the 150 MHz band.[21] NABER also supports our decision to continue to use the existing list of SMAs. NABER states that ITA has failed to provide evidence demonstrating congestion on the exclusive Taxicab Radio Service frequencies in the relevant areas and that frequencies that Taxicab Radio Service eligibles would have access to through an update of the Census list are very congested with Business users.[22] Finally, NABER amends the list of frequencies it requested in its Petition for Reconsideration for high power paging in Puerto Rico and the Virgin Islands.[23]

12. In its Partial Opposition to Petitions for Reconsideration, FIT, like NABER, disputes ITA's contention that the Taxicab Radio Service needs more spectrum.[24] FIT disagrees with NABER's request, however, that we reconsider our decision not to permit high power paging on certain 150 MHz business frequencies.[25]

13. In its Reply comments, ITA submits data purporting to demonstrate its need for spectrum, including recent survey results showing that there has been a 90% increase in the demand for Taxicab Radio Service spectrum in a five-year period.[26] ITA also reiterates its belief that we should apply 1984 Census data in determining geographic sharing of 150 MHz channels by the Business and Taxicab Radio Services. ITA argues that use of the new data is particularly appropriate regarding the six new shared frequency pairs that the *Report and Order* allocates, because there are no current users and thus no grandfathering would be necessary.[27]

14. In its Reply comments, FIT disputes NABER's claim that use of any newly created offset channels in locations outside of urban areas would be limited because of extensive use of adjacent frequencies that would require mileage separations. FIT again argues in favor of the creation of new offset channels.

V. DISCUSSION

15. *New Offset Channels*. Regarding our decision not to create new offset channels adjacent to existing 150 MHz channels in the continental United States, ITA and FIT argue, as stated, that the 150 MHz band is currently very congested and that creating new offset channels could help alleviate spectrum scarcity. They also argue that, because we now have a frequency coordination requirement in the 150 MHz band for the Business Radio Service, part of our rationale for refusing to create such offset channels in 1971 is no longer valid.[28]

16. These same arguments were made in comments filed in response to the *Petition for Rule Making* in this proceeding, and, in fact, we acknowledged their validity in the *Report and Order*.[29] In the *Report and Order*, however, we also weighed the benefits of creating the offset channels against the possible drawbacks. Those drawbacks include the possibility that operation on the newly created channels would result in degradation of the quality of existing operations on adjacent channels and would limit future assignment of narrowband frequencies, thus inhibiting implementation of spectrally-efficient narrowband technologies. The drawbacks, coupled with the fact that the frequencies would be available only on a very limited basis because of high adjacent channel usage, led us to conclude that creation of the channels would not be in the public interest.[30] In the absence of new facts, we affirm that conclusion. Nor are we convinced that we could avoid problems by creating new offset channels and assigning them only outside of urban areas, as FIT suggests.[31] The creation of 15 kHz offset channels in rural

areas would restrict the potential for development of narrowband technology and therefore be contrary to our stated goal of encouraging the growth of narrowband technology.[32] In any event, FIT fails to present any evidence concerning the forest product industry's need for spectrum that we have not already considered in adopting the *Report and Order*.

17. *High Power Paging*. NABER petitions for reconsideration of our decision to reject additional high power paging channels in the 150 MHz band, specifically on the 154.625 MHz and 157.740 MHz frequencies. NABER again asserts that there is significant congestion on 152.480 MHz, the only 150 MHz channel on which we currently allow high power paging. In the *Report and Order* we pointed out that increasing the power on these frequencies would increase the potential for adjacent channel interference, that existing assignments already reflect careful interservice coordination, and that the ability to create new paging systems operating at higher power levels would be very limited. We concluded that, with other options available to meet high power paging needs in the United States, such as use of 450 MHz and 900 MHz paging frequencies, increasing the potential for interference in the 150 MHz band would not be in the public interest.[33]

18. NABER contends that the frequency coordination process can control the location of high power paging systems to minimize adjacent channel interference to two-way systems. Additionally, NABER states that the same cross-service coordination procedures between NABER and other coordinators that have worked successfully on existing Business Radio Service paging-only frequencies can be utilized to permit the use of higher powered paging stations.[34]

19. We recognize the heavy use made of the 152.480 MHz high power paging frequency and that some measure of relief would be beneficial to existing licensees and new applicants. We have reviewed the arguments presented and considered the potential impact upon co-channel and adjacent channel users of permitting higher power on both 154.625 MHz and 157.740 MHz. We maintain that permitting higher power on 154.625 MHz would create a severe potential for interference in light of the low power limitations applicable to both co-channel and adjacent channel users.[35] With respect to 157.740 MHz, however, usage limitations on the adjacent channels are similar to the limitations on channels adjacent to the existing high power frequency, 152.480 MHz. Upon reconsideration, we believe that with proper coordination, increased power on 157.740 MHz may be possible without creating significant adjacent channel concerns. We are therefore amending the Rules adopted in the *Report and Order* to increase the permitted power output on 157.740 MHz to 350 watts. Existing paging systems on this frequency will not, however, automatically be able to increase their permitted output power. Requests for power increases must be properly coordinated and, depending on the location of adjacent channel private radio and common carrier stations, may not be authorized.[36] If new systems requesting this new high power frequency cannot be coordinated, applicants and coordinators should pursue other alternatives including the use of 450 or 900 MHz paging frequencies which can be licensed at the higher power.

20. *Geographic Sharing Between the Business and Taxicab Radio Services*. We also affirm our decision to continue to use the established criteria for assignment of 150 MHz band frequencies currently shared geographically by Taxicab Radio Service and Business Radio Service users. ITA's Petition suggests that we should make a "one-time rule change" to permit the use of 1984 population data in assigning these frequencies.[37] We see no justification, however, for updating the Rules on a "one-time only" basis. The 1950 Census was used when the sharing of the subject frequencies among the Taxicab and Business Radio Services was first established. Use of that data led to a list of SMAs where the frequencies were available to the Taxicab Radio Service. A new analysis to determine sharing criteria that is based upon a different SMA population standard could result in a replication of the current list. Since the beginning of this sharing arrangement, both radio services have developed considerably. Any change in the list of SMAs would cause considerable disruption to those Business Radio Service licensees already on the frequencies, and insufficient justification has been provided to warrant such a change. If we decided to follow ITA's suggestion that we update on a "one time only" basis, 1984 population data would also be outdated in a few years and thus present the same problem that ITA sees with use of the 1950 Census data. Furthermore, ITA apparently does not recognize that additional nationwide channels were made available in the *Report and Order* to the Taxicab Radio Service to meet their growing demand outside of the urban areas.

21. *Taxicab Radio Service Frequencies*. The *Report and Order* provides for use of the twelve existing offset channels outside SMAs with populations of 50,000 or more and gives the Taxicab Radio Service use of four of the channels.[38] In the *Report and Order*, we assigned 152.315/157.575 MHz and 152.345/157.605 MHz to the Taxicab Radio Service.[39] ITA's Petition asks that we assign different frequencies. ITA points out that if we assign 152.285/157.545 and 152.435/157.695 MHz, then two existing Taxicab Radio Service nationwide frequencies, *i.e.*, 152.270/157.530 MHz and 152.450/157.710 MHz, will be adjacent only to other Taxicab Radio Service frequencies and applicants can be licensed on these frequencies without interservice coordination.[40] NABER's Opposition to ITA's Petition for Reconsideration expresses no disagreement with ITA on this issue.

22. Insulating the Taxicab Radio Service's nationwide frequencies from the need for interservice coordination would simplify the licensing process for a number of applicants and, therefore, appears to be in the public interest. The replacement frequencies requested by ITA are essentially equivalent from an availability and service quality standpoint to those we assigned to the Taxicab Radio Service. Substituting the channels requested for those assigned would, therefore, have no impact from a spectrum management perspective. For these reasons, we are amending the Rules adopted pursuant to the *Report and Order*. We are assigning 152.285/157.545 and 152.435/157.695 to the Taxicab Radio Service rather than the Business Radio Service and 152.315/157.575 MHz and 152.345/157.605 to the Business Radio Service rather than the Taxicab Radio Service. Any assignments made to date which are inconsistent with this revised designation of channels will be grandfathered.

23. *High Power Paging Frequencies In Puerto Rico and the Virgin Islands*. NABER asks that we also amend particular frequency assignments to the Business Radio Service. In the *Report and Order*, we created 22 new offset channels in Puerto Rico and the Virgin Islands and al-

located five of those channels exclusively for high power paging operations.[41] These frequencies are 150.830, 150.860, 150.890, 150.920, and 150.950 MHz. NABER states, however, that further study of NABER's data base shows that three of the five frequencies selected for paging are adjacent to currently licensed narrowband systems in Puerto Rico and the Virgin Islands. NABER states therefore that it will be impossible to use the three frequencies because adequate adjacent channel separations cannot be achieved. NABER therefore requests that we amend the table of assignments to specify 150.830, 150.920, 151.070, 151.190, and 151.310 MHz as high power paging frequencies.[42]

24. We agree with NABER that it is appropriate to designate frequencies further removed from existing narrowband operations and thus maximize potential use of the spectrum. We are therefore modifying the Rules adopted pursuant to the *Report and Order* as requested by NABER.

25. *Maximum Output Power*. NABER also requests that we specify a maximum output power of 110 watts for Business Radio Service use on the eight offset channels which, under the *Report and Order*, are assigned to that service for use outside of the designated SMAs. NABER requests that the same power limitation apply to Business Radio Service users on the channels that were already shared on a geographic basis by the Business Radio Service and the Taxicab Radio Service.[43]

26. We have not specified a maximum output power for Business Radio Service use on any of the channels NABER discusses. The power limitation set forth in Section 90.205(b) of the Rules, 47 C.F.R. § 90.205(b), which specifies a maximum output power of 350 watts for the 100-216 MHz band, governs. As NABER points out, however, Taxicab Radio Service licensees on the frequencies are limited to 75 watts output.[44] NABER indicates that it has never received a Business Radio Service application for a license to operate on the shared frequencies at greater than 110 watts output power. A 110 watt power output limitation is adequate for satisfactory operation on these frequencies and is the typical maximum permitted power for Business Radio Service frequencies in the 150 MHz range. We therefore amend our Rules upon reconsideration to specify a 110 watt limitation which will make operations on the shared channels more compatible.

27. *Two - Frequency Versus Single - Frequency Simplex Operation*. ITA requests that the Commission require two-frequency operation on Business Radio Service channels that are adjacent to Taxicab Radio Service channels.[45] ITA argues that it demonstrated in its comments on the Petition for Rule Making that the single-frequency simplex operations used in the Business Radio Service are technically and operationally incompatible with the two-frequency simplex operations used in the Taxicab Radio Service.[46] ITA also states that NABER, in its reply comments, recommended that the Commission allocate the frequencies that are utilized within the SMAs by the Taxicab Radio Service for duplex operation[47] by whomever uses these frequencies outside of the SMAs.[48]

28. The *Notice of Proposed Rule Making* proposed to assign all twelve 152/157 MHz frequencies to the Business Radio Service.[49] Because Taxicab Radio Service users were also eligible to use these frequencies, operational incompatibility between single-frequency and two-frequency Business and Taxicab Radio Service co-channel users was possible. Thus, ITA's comments discussed incompatibility of Taxicab and Business Radio Service operations on shared co-channel frequencies. The *Report and Order*, however, designated eight 152/157 MHz frequencies for the Business Radio Service and four for the Taxicab Radio Service, thus eliminating co-channel problems.[50] As ITA points out, though, adjacent channel operation in the same geographic area by Business Radio Service and Taxicab Radio Service users can result in interference. ITA's Petition for Reconsideration thus addresses the incompatibility of Taxicab and Business Radio Service operations on adjacent channel frequencies. For example, at a Taxicab Radio Service base station receiver, a high power Business Radio Service base station on a 157 MHz frequency could interfere with a 20 watt Taxicab Radio Service mobile transmission 15 kHz removed if the Taxicab Radio Service mobile was operating close to the Business Radio Service base station.

29. Upon further review of this issue, to mimimize the potential interference problem between adjacent frequency Taxicab and Business Radio Service operations, we will limit the use of the four new 157 MHz Business Radio Service frequencies to mobile only operation. This will eliminate Business Radio Service base station operation on the newly assigned 157 MHz frequencies that are adjacent to Taxicab Radio Service mobile frequencies. It will also permit Business Radio Service licensees to establish two-frequency duplex operation by utilizing a 152 MHz frequency for base station use and one of the four new 157 MHz mobile only frequencies for mobile use.[51] In accordance with existing rules, mobile relay operation in the Business Radio Service will still not be permitted on these frequencies.[52]

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

30. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

In response to Petitions for Reconsideration, the Commission believes that it would be in the public interest to modify certain decisions made in the *Report and Order* in this proceeding. This action will promote more intensive use of available private land mobile spectrum in the congested 150 MHz band by a significant number of small business and taxicab companies.

II. Summary of the issues raised by the public comments in response to the Previous Final Regulatory Flexibility Analysis:

No public comments were received that addressed the Final Regulatory Flexibility Analysis contained in the *Report and Order*. That analysis remains valid for the rule modifications being adopted herein.

VII. CONCLUSION

31. For the foregoing reasons, the *Report and Order* in this proceeding is affirmed to the extent indicated herein and amended or clarified to the extent indicated herein.[53]

32. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by the National Association of Business and Educational Radio, Inc. IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

33. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the International Taxicab Association IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.

34. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Forest Industries Telecommunications IS DENIED.

35. IT IS FURTHER ORDERED that pursuant to the authority found in Sections 4 and 303(r) of the Communications Act of 1934, as amended, Part 90 of the Commission's Rules and Regulations ARE AMENDED as specified in the Appendix. These amendments shall become effective **September 14, 1990.**

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 90 - PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

2. Section 90.75(b) is amended by: (1) removing frequencies 152.285, 152.435, 157.545 and 157.695; (2) adding frequencies 152.315, 152.345, 157.575 and 157.605; and (3) revising the entries for frequencies 150.845, 150.860, 150.890, 150.935, 150.950, 151.070, 151.085, 151.190, 151.205, 151.310, 151.325, 152.375, 152.405, 157.635, 157.665, and 157.740 in the Business Radio Service Frequency Table to read as follows:

§ 90.75 Business Radio Service.

* * * * *

(b) * * *

Business Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
	* * * * *	
150.845	Base or mobile	8
150.860	do	8
	* * * * *	
150.890	do	8
	* * * * *	
150.935	Base or mobile	8
150.950	do	8
	* * * * *	
151.070	Base	8,10,12
151.085	Base or mobile	8
	* * * * *	
151.190	Base	8,10,12
151.205	Base or mobile	8
	* * * * *	
151.310	Base	8,10,12
151.325	Base or mobile	8
	* * * * *	
152.315	do	1,9
152.345	do	1,9
	* * * * *	
152.375	do	1,9
152.405	do	1,9
	* * * * *	
157.575	do	1,9
157.605	do	1,9
	* * * * *	
157.635	do	1,9
157.665	do	1,9
	* * * * *	
157.740	Base	10,11,12
	* * * * *	

3. Section 90.93(b) is amended by revising the entries for frequencies 152.285, 152.315, 152.345, 152.435, 157.545, 157.575, 157.605, and 157.695 in the Taxicab Radio Service Frequency Table to read as follows:

§ 90.93 Taxicab Radio Service.

* * * * *

(b) * * *

Taxicab Radio Service Frequency Table

Frequency or band	Class of Station(s)	Limitations
* * * * *		
152.285	do	.....
* * * * *		
152.315	do	1,2
* * * * *		
152.345	do	1,2
* * * * *		
152.435	do	.....
* * * * *		
157.545	do	.....
* * * * *		
157.575	do	1,2
* * * * *		
157.605	do	1,2
* * * * *		
157.695	do	.....

* * * * *

4. Section 90.555(b) is amended by revising the entries for frequencies 150.845, 150.860, 150.890, 150.935, 150.950, 151.070, 151.085, 151.190, 151.205, 151.310, 151.325, 152.285, 152.315, 152.345, 152.375, 152.390, 152.435, 157.545, 157.560, 157.575, 157.605, 157.620, 157.635, 157.680, and 157.695 in the combined frequency list to read as follows:

§ 90.555 Combined frequency listing.

* * * * *

(b) * * *

Frequency	Services	Special limitations
* * * * *		
150.845	IB,LA	IB use in Puerto Rico and Virgin Islands
150.860	IB,LA	Do.
* * * * *		
150.890	IB,LA	Do.
* * * * *		
150.935	IB,LA	IB use in Puerto Rico and Virgin Islands
150.950	IB,LA	Do.
* * * * *		
151.070	IB,PH	Do, paging only
* * * * *		
151.085	PH,IB	IB use in Puerto Rico and Virgin Islands
* * * * *		
151.190	IB,PO	Do, paging only
151.205	PO,IB	IB use in Puerto Rico and Virgin Islands
* * * * *		
151.310	IB,PO	Do, paging only
151.325	PO,IB	IB use in Puerto Rico and Virgin Islands
* * * * *		
152.285	LX	
* * * * *		
152.315	IB,LX	IB outside, LX inside SMAs over 50,000 pop.
* * * * *		
152.345	IB,LX	IB outside, LX inside SMAs over 50,000 pop.
* * * * *		
152.375	IB,LX	IB outside, LX inside SMAs over 50,000 pop.
152.390	LX	
* * * * *		
152.435	LX	
* * * * *		
157.545	LX	
157.560	LX	LX within SMAs over 50,000 pop.
157.575	IB,LX	IB outside, LX inside SMAs over 50,000 pop.

* * * * *

157.605	IB,LX	IB outside, LX inside SMAs over 50,000 pop.
157.620	IB,LX	LX within SMAs over 50,000 pop.
157.635	IB,LX	IB outside, LX inside SMAs over 50,000 pop.

* * * * *

157.680	IB,LX	LX within SMAs over 50,000 pop.
157.695	LX	

* * * * *

FOOTNOTES

[1] Report and Order, PR Docket No. 88-373, 4 FCC Rcd 5756 (1989). The Commission initiated the proceeding in response to a Petition for Rule Making filed by the National Association of Business and Educational Radio, Inc. and the International Taxicab Association. *See* Notice of Proposed Rule Making, PR Docket No. 88-373, 3 FCC Rcd 4817 (1988).

[2] Petitions were filed by the National Association of Business and Educational Radio, Inc. (NABER), Forest Industries Telecommunications (FIT), and the International Taxicab Association, Inc. (ITA). NABER filed an Opposition to the Petitions for Partial Reconsideration of FIT and ITA. FIT filed a Partial Opposition to ITA's and NABER's Petitions for Partial Reconsideration. ITA filed a Reply to the FIT and NABER Oppositions.

[3] Report and Order, Docket No. 17703, 30 FCC 2d 2097 (1971).

[4] This arrangement is depicted in a chart in paragraph 5 of the Report and Order in this proceeding.

[5] *Id.* Section 90.93(c) of our Rules provides that 1950 Census data shall be used for making assignments in the Taxicab and Business Radio Services. The three shared frequency pairs are 152.3/157.560, 152.36/157.620, and 152.42/157.680.

[6] Report and Order at paragraphs 12-13.

[7] *Id.* at paragraphs 14-15.

[8] *Id.* at paragraphs 20-23.

[9] *Id.* at paragraphs 30-32.

[10] *Id.* at paragraph 33.

[11] *Id.* at paragraph 36.

[12] ITA Petition at pages 2-3; FIT Petition at pages 6-7.

[13] FIT Petition at pages 7-10.

[14] NABER Petition at pages 3-6. NABER asked that we increase the number of 150 MHz paging frequencies that have a maximum permitted power output of 350 watts. Currently, one 150 MHz paging frequency, 152.480 MHz, is permitted a power output of 350 watts. Two frequencies, 154.625 and 158.460 MHz, are permitted a maximum of 20 watts output and one frequency, 157.740 MHz, is permitted a maximum of 75 watts output.

[15] NABER Petition at pages 3-6.

[16] ITA Petition at pages 5-7.

[17] ITA Petition at page 4.

[18] NABER Petition at 3-6. *See also*, NABER Opposition to Petition for Partial Reconsideration and Errata to Opposition, filed October 27, 1989.

[19] NABER Petition at pages 7-8.

[20] ITA Petition at pages 4-5.

[21] NABER Opposition at pages 1-5.

[22] *Id.* at pages 8-9.

[23] *Id. See also*, Errata to Opposition, filed on October 27, 1989.

[24] FIT Opposition at pages 1-2.

[25] *Id.* at pages 2-4.

[26] ITA Reply at pages 5-7. The survey was jointly conducted by ITA and the University of North Carolina.

[27] *Id.* at pages 8-9.

[28] ITA Petition at pages 2-3; FIT Petition at pages 6-7.

[29] Report and Order at paragraphs 8 and 12.

[30] *Id.* at paragraph 13.

[31] FIT Petition at pages 7-8.

[32] *See generally*, Report and Order, Gen. Docket No. 87-14, 3 FCC Rcd 5287 (1988), *recon denied*, 4 FCC Rcd 6407 (1989).

[33] Report and Order at paragraphs 30-32.

[34] NABER Petition for Partial Reconsideration at 4.

[35] For example, a high power system (350 watts) in close proximity to a low power system (2 watts) operating on an adjacent channel could cause interference because of the high transmitted signal intensity received by the low power system's receiver.

[36] We recently addressed the issue of inter-service adjacent channel protection in the Memorandum Opinion and Order in CC Docket No. 88-135, FCC 90-255 (adopted July 3, 1990). In that item, we adopted a standard requiring common carriers using 150 MHz frequencies that apply to increase the effective radiated power of their base stations above 500 watts to be at least 3.2 miles from any adjacent channel private land mobile base station. The potential for inter-service adjacent channel interference is equally applicable here. We will consider this 3.2 mile adjacent channel separation as a guideline for stations proposing use of the 157.740 MHz frequency at output powers in excess of 75 watts. This guideline will assist applicants, coordinators, and the Commission in determining and reducing adjacent channel interference.

[37] ITA Petition at pages 5-7.

[38] In its Petition for Partial Reconsideration, ITA argues that the Taxicab Radio Service has a need for all twelve of the channels and that the Commission erred in assigning eight of the channels to the Business Radio Service. ITA Petition at pages 3-4. ITA, however, presents no evidence of its need for the additional channels beyond that which we have already considered. *See* Report and Order at paragraphs 18-23. We therefore affirm the Report and Order on the issue of the number of channels that should be allocated to the Taxicab Radio Service.

[39] Report and Order at paragraphs 21-23.

[40] ITA Petition at pages 3-4.

[41] Report and Order at paragraph 33.

[42] NABER Opposition to Petition for Reconsideration at page 9 and Errata to Opposition, filed October 27, 1989.

[43] NABER Petition at pages 7-8.

[44] 47 C.F.R. § 90.205(b) at note 3.

[45] Taxicab Radio Service licensees use two-frequency simplex operation with the dispatcher transmitting on a 152 MHz frequency and the taxicabs transmitting back to the dispatcher on a 157 MHz frequency. This mode of operation enables the dispatcher to control the radio system since the mobile units can only talk to the dispatcher and not to each other. Business Radio Service licensees predominantly use single-frequency simplex operation with the base station and the mobile units transmitting on the same frequency. All simplex operations utilize a "push-to-talk" procedure to transmit a message.

[46] ITA Petition at pages 4-5, *citing* ITA Comments at 5-6 and Attachment A.

[47] Duplex operation utilizes two frequencies and permits transmitting and receiving simultaneously (as in a telephone conversation). The "push-to-talk" procedure is not necessary.

[48] *Id.*, *citing* NABER Reply Comments at page 16.

[49] Notice of Proposed Rule Making at paragraph 13.

[50] Report and Order at paragraphs 22-23.

[51] We note, however, that special considerations must be taken when coordinating two-frequency duplex operations on frequencies that also support simplex operations. We further note that it may be necessary for licensees of two-frequency duplex systems to install additional equipment to ensure compliance with the requirement to monitor a base station frequency prior to transmitting. We can require the installation of such monitoring equipment if its absence exacerbates an interference situation. *See* 47 C.F.R. §§ 90.173(b) and 90.403(e).

[52] Section 90.243(a)(1) does not permit high power mobile relay operation on Business Radio frequencies below 450 MHz in the continental United States.

[53] Additionally, the rules adopted herein include corections to the frequency tables in the rules adopted in the *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

JOYCE COMMUNICATIONS, INC. File No. 63500-89-35-RPS

Notice of Apparent Liability for Forfeiture for operating a facility in an unauthorized manner with respect to Station KNKK208 in the Public Mobile Service at Bonita Springs, Florida

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1990; Released: July 30, 1990

By the Chief, Mobile Services Division:

1. On July 24, 1989, the Mobile Services Division ("MSD") issued a Notice of Apparent Liability for Forfeiture (" *NALF* ") to Joyce Communications, Inc. ("Joyce"), finding that an apparent violation of Section 22.3 of the Commission's rules had occurred for operating Station KNKK208 at Bonita Springs, Florida, in an unauthorized manner, and assessed a forfeiture in the amount of $4,000.00.

2. Joyce has taken no action in response to the *NALF*, and the $4,000.00 forfeiture has remained unpaid. As a result, Joyce is hereby being ordered to pay the $4,000.00.

ORDERING PARAGRAPHS

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Joyce Communications, Inc. FORFEIT to the United States the sum of Four Thousand Dollars ($4,000.00) for the violation of Section 22.3 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 19209, Washington, DC 20036.

4. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

5. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Joyce Communications, Inc. by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

DIGITAL PAGING SYSTEMS OF NEW JERSEY, INC. File No. 63500-09-06-JSG

Notice of Apparent Liability for Forfeiture for failure to file notification with respect to Station KKB374 in the Public Mobile Service at Malaga, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1990; Released: July 30, 1990

By the Chief, Mobile Services Division:

1. Digital Paging Systems of New Jersey, Inc. ("Digital") has filed a "Response to Notice of Apparent Liability" ("response") of the $1,000.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (" *NALF* ") issued April 12, 1990.

I. BACKGROUND

2. Digital operated a facility on frequency 459.225 MHz at Malaga, New Jersey, without timely filing its required FCC Form 489 notification. Digital subsequently filed its FCC Form 489 within 30 days after the expiration date of its construction authorization.

3. On April 12, 1990, the MSD issued the *NALF*, finding that an apparent violation of Section 22.43 of the Commission's Rules had occurred for operating a facility in an unauthorized manner. In the *NALF*, the MSD noted that the normal forfeiture for operation of a facility before filing FCC Form 489 is $10.00 per day for each day of the violation. Digital did not state the day it commenced operation but conceded that it had begun operation before it filed its FCC Form 489. In these circumstances, the MSD assessed a $1,000.00 forfeiture.

II. DIGITAL'S CONTENTIONS

4. Digital argues that the $1,000.00 forfeiture should be reduced. It claims that it commenced operations on February 15, 1990, and filed its FCC Form 489 on February 28, 1990, thereby operating in violation of Section 22.43 for 13 days. Consequently, Digital contends that the correct forfeiture should be $10.00 per day for 13 days, or $130.00. Digital attaches as Exhibit A to its request a document which, it states, confirms the date of activation of its Malaga facility. Digital contends that such documentation was not available when it submitted its FCC Form 489.

III. DISCUSSION

5. After carefully reviewing the facts and Digital's assertions, we decline to grant its request for reduction of the forfeiture. Digital has presented no reason for reducing its forfeiture. Its exhibit does not confirm the starting date of its system and is, in fact, largely illegible. Therefore, we find no basis upon which to grant Digital's request.

IV. ORDERING PARAGRAPHS

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Digital Systems of New Jersey, Inc. FORFEIT to the United States the sum of One Thousand Dollars ($1,000.00) for the violation of Section 22.43 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order.

7. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Digital Paging Systems of New Jersey, Inc. by Certified Mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 24, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMENDMENT TO AT & T'S COMPARABLY EFFICIENT INTERCONNECTION PLAN FOR TRANSACTION SERVICES

On June 7, 1990, the American Telephone and Telegraph Company (AT&T) filed an amendment to its comparably efficient interconnection (CEI) plan for the provision of Transaction Services. AT&T proposes to expand its current offering of Transaction Services that allows merchants to interact with the computers used by banks and other financial service institutions to process sales, credit, debit, check and other transactions. *See In the Matter of AT&T Plan for the Provision of Transaction Services*, 3 FCC Rcd 2702 (1988), *applications for review denied*, 4 FCC Rcd 4544 (1989).

AT&T states that it plans to provide a new point of sale capability that will allow Transaction Services customers to offer products and services to consumers "using a single nationwide telephone number to reach multiple sites . . . determined by the customer's calling area database." Using the customer database, calls to the nationwide number would be routed to the appropriate customer location. AT&T states that Transaction Services will create and store call detail information for the customer, and use protocol processing capabilities to send the call detail information to a central point for further processing, aggregation, and storage. AT&T adds that it plans to use additional tariffed communications services in the provision of Transaction Services. AT&T also proposes to expand its offering of the type of point of sale service described in the original CEI plan to include commercial establishments and customers.

AT&T states that it will continue to satisfy the *Computer III* CEI requirements and the Commission's other nonstructural safeguards in the manner described in its approved CEI plan for Transaction Services.

Interested parties are to file comments on this amendment by **August 10, 1990,** and reply comments by **August 20, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of AT&T's amendment can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
July 9, 1990

Released: July 30, 1990

John R. Feore, Esq.
Dow, Lohnes & Albertson
1255 Twenty-third Street, N.W.
Washington, D.C. 20037

Counsellor:

This refers to a request for waiver of Section 73.3555 of the multiple ownership rules filed by Eric B. Schultz ("Schultz") and Atlantic Ventures of Boston ("Atlantic"). Schultz is the President of Atlantic, which is the general partner of the licensee of station WROR-FM, Boston, Massachussetts. Schultz seeks to serve as President of the Board of Directors of Brown Broadcasting Service ("BBS"), licensee of station WBRU-FM, Providence, Rhode Island. BBS is affiliated with Brown University. Since there is an overlap of the 3.16 mV/m contours of stations WROR-FM and WBRU-FM, a waiver of Section 73.3555 of the Commission's rules is required for Schultz to assume the board position with BBS.

Schultz previously served on the Board of Directors of BBS, from 1981 through 1988. However, in December of 1988, Schultz assumed his ownership interest in WROR-FM, and, due to the contour overlap, resigned his position with BBS. Schultz now seeks to renew his connection with WBRU-FM and his *alma mater*, Brown University. The waiver request is based upon four principal grounds: (1) the nonprofit, educational character of WBRU-FM; (2) the limited and completely non-economic nature of his role in the operations of WBRU-FM, in contrast to his full-time role at station WROR-FM; (3) the *de minimis* nature of the WROR-FM and WBRU-FM 3.16 mV/m overlap; and (4) the distinctiveness of the Boston and Providence markets and the substantial diversity of broadcast service available in the contour overlap area.

The basic principles embodied in the Commission's multiple ownership rules are promotion of diversity of ownership in order to maximize the diversification of viewpoints as well as prevention of any undue concentration of economic power contrary to the public interest. *See Multiple Ownership Rules*, 97 FCC 2d 977 (1984); *recon. granted in part and denied in part*, 1 FCC Rcd 802 (1986). The Commission is not without flexibility to respond to situations where applicability of fixed multiple ownership or control standards would be contrary to other public interest concerns. Accordingly, in some cases a waiver of the rules has been allowed in order to achieve appropriate and desirable improvements in service. *See, Capital Cities Communications, Inc.*, 59 RR 2d 451 (1985); *Ben C. Fisher, Esq.*, 1 FCC Rcd 293 (1986). Before such a waiver can be granted, however, the party requesting the waiver must sustain the burden of showing that the benefits to be achieved by the proposal outweigh any detriments which may occur to the policies underlying the rule to be waived. Because of the unique situation set forth below, we conclude that a grant of a waiver to Schultz would be consistent with the public interest and Commission precedent.

Station WBRU-FM operates on a nonprofit basis, with one of its purposes being to provide broadcasting experience and instruction to university students. Although it is licensed as a commercial station in order to support itself on advertising revenues, station WBRU-FM is managed and staffed by the students of Brown University. Therefore, the station performs many of the same functions that would typically be provided by a noncommercial educational station operating on a reserved frequency.

Additionally, while Schultz is employed full time at station WROR-FM, his role in the operation of WBRU-FM will be limited, and of a non-economic nature. He has never received, nor will he receive, any compensation for his services other than reimbursement of his expenses. Nor could he hold any ownership interest in the station. He will serve on the seven-member Board of Directors of BBS as President, casting one of seven equal votes on matters before the Board. The Board is entrusted with the power to make significant decisions facing the station, and to ensure that the station is financially stable and in compliance with applicable regulations. However, the day-to-day operations are left to the Executive Board, which is composed of students. The Board of Directors generally meets twice a year, and Shultz expects to continue his past practice of spending an average of less than two hours per week on matters related to WBRU-FM. Further, Schultz states that he will recuse himself from any Board consideration of matters involving WROR-FM. The Commission has previously recognized that the involvement of a commercial broadcaster in broadcasting endeavors of an educational nature can serve the public interest. *See Midcontinent Broadcasting Co.*, 2 FCC Rcd 210 (1987). A grant of the waiver would, in a similar fashion, allow the educational program at Brown University to benefit from Schultz's broadcasting experience.

Based upon our own calculations, it is evident that the overlap of the 3.16 mV/m contours of WROR-FM and WBRU-FM, while not *de minimis*, is not substantial. The overlap area represents 1.38% of WROR-FM's 3.16 mV/m contour, and 2.12% of WBRU's 3.16 mV/m contour. Moreover, the population within the stations' overlap areas appears to be about 1% or less of the population residing in each station's service contour. Station WROR-FM has been granted a construction permit (File No. BPH-891024IH) to modify its facility, which would not change these figures. Finally, WBRU-FM has a pending modification application (File No. BPH-871106IU), which if granted and constructed, would result in the overlap areas being less than 1%.

Finally, stations WBRU-FM and WROR-FM serve separate and distinct markets. Because these cities are located in different states, and are their respective state capitals, issues of newsworthiness are different in each location. The absence of direct and substantial competition between the two stations largely undercuts the presumption that common interests would significantly reduce the diversity of views which they present. Not only are stations WROR-FM and WBRU-FM under entirely different ownership, but the nature and the purpose of the stations' respective existences are wholly unalike. WBRU-FM's association with Brown University, a school uniquely asso-

ciated with Providence, is evidence that the station is aimed at a market which is distinct from that of WROR-FM. Accordingly, our concerns with the effect of common control on the vigor of competition are largely blunted. In addition, both cities are in large markets with numerous media outlets, and there is substantial diversity of broadcast service available in the contour overlap area.[1] Therefore, the opportunity to exercise an inordinate effect on public opinion or to achieve any undue concentration of economic control contrary to the public interest is unlikely to exist.

For the aforementioned reasons and based upon the representations made by Shultz, we find that a grant of Shultz's waiver request will serve the public interest. Accordingly, it is ordered that the request for waiver of Section 73.3555 of the Commission's multiple ownership rules IS HEREBY GRANTED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The Boston metropolitan area is the seventh largest media market in the country, and the Providence metropolitan area is the twenty-eighth largest. Boston is served by eight television stations, fourteen AM stations, sixteen FM stations, nineteen daily newspapers and virtually every municipality in the metropolitan area has cable television service. Providence is served by five television stations, fifteen AM stations, eight FM stations and has heavy cable saturation.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-988 **Released: July 31, 1990**

GTE Spacenet Corporation (GTE) has filed a Petition for Declaratory Ruling asking the Commission to clarify that parties transmitting to domestic communications satellites can do so only pursuant to agreements with the licensed space station operator or with another authorized user of that satellite. GTE requests that the Commission state that those who intentionally transmit to a satellite without obtaining permission to do so will be subject to sanctions. Comments with respect to GTE's Petition for Declaratory Ruling should be filed on or before **August 27, 1990** and Reply Comments on or before **September 10, 1990.** Comments should be addressed to the Secretary, FCC 1919 M Street, N.W. Washington, D.C. 20554. For further information, contact Rosalee C. Gorman, 2025 M Street, N.W., Washington, D.C. 20554, Room 6324, 202-634-1624.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: July 31, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERITECH'S PETITION FOR WAIVER OF PART 69 RULES CONCERNING LOCAL SWITCHING

On June 26, 1990, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of Sections 69.106(b) and 69.205(c) of the Commission's rules. 47 C.F.R. § 69.106(b) and § 69.205(c). Ameritech states that the waiver will allow it to disaggregate components that would otherwise be bundled in the Local Switching access charge element. Ameritech claims that the waiver is necessary to facilitate rapid implementation of its Open Network Architecture (ONA) plan. Ameritech adds that it intends to implement ONA regardless of the recent 9th Circuit Court decision.

In its petition, Ameritech lists the currently bundled Basic Service Elements (BSEs) that it proposes to disaggregate into separate rate elements. Ameritech also lists BSEs that are not currently part of Local Switching, but which Ameritech intends to offer when ONA is implemented. In addition, Ameritech describes how it proposes to calculate Local Switching rates if the Commission grants the requested waiver.

Currently, the Commission's access rules do not provide for the unbundled offering of BSEs. The Commission has an outstanding Notice of Proposed Rule Making to examine what modifications to Part 69 are necessary to permit the unbundled offering of BSEs and Basic Service Arrangements (BSAs). Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rule Making, CC Docket No. 89-79, 4 FCC Rcd 3983 (1989). Ameritech states that, in lieu of existing Part 69 rules, it proposes to comply with the revised rules submitted by Ameritech in the Commission's pending Part 69 proceeding. Ameritech states that while the Part 69 proceeding is pending, a waiver will permit Ameritech to file its federal ONA access tariff. Ameritech adds that it will comply with any rules the Commission adopts in the Part 69 proceeding. Ameritech also requests expeditious treatment of its waiver request because it plans to file its federal ONA access tariff by mid-summer.

Interested parties should file comments on this petition by **August 27, 1990,** and reply comments by **September 11, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Ameritech's petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

TELEPAGE COMMUNICATIONS, INC. File No. 63500-89-13-RPS

Notice of Apparent Liability for Forfeiture for failure to file notification with respect to Station KNKC797 in the Public Mobile Service at Stockton, California

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1990; Released: July 31, 1990

By the Chief, Mobile Services Division:

1. Telepage Communications, Inc. ("Telepage") has filed a request seeking rescission or reduction of the $3,440.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (" *NALF* ") issued March 17, 1989.

I. BACKGROUND

2. Telepage operated a control facility on frequency 72.36 MHz at a location other than that which was originally authorized. Telepage subsequently filed a request for Special Temporary Authority ("STA") to continue to operate Station KNKC797 pending Commission action on an application to correct the error. On March 17, 1989, the MSD issued the *NALF* in the amount of $3,440.00, finding that an apparent violation of Section 22.3 of the Commission's Rules had occurred for operating a facility in an unauthorized manner.

II. TELEPAGE'S CONTENTIONS

3. Telepage states that the unauthorized operation was an unintentional oversight on the part of the firm that transferred the station license to Telepage. It contends that Telepage is a small company, and the assessed forfeiture places a strain on its operation. Telepage notes that as soon as the violation was discovered upon renewing its license, it immediately brought the matter to the Commission's attention. It adds that the matter has already cost the company more than several thousand dollars in various fees.

III. DISCUSSION

4. After reviewing the facts and Telepage's assertions, we decline to grant its request for rescission or reduction of the forfeiture. We have previously noted that

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). Therefore, the fact that the violation resulted from an unintentional oversight on its predecessor's part does not persuade us to cancel the forfeiture against Telepage. Moreover, a licensee's voluntarily notifying the Commission of a potential rule violation is a factor which is taken into account in setting the amount of forfeiture. In this case, however, this mitigating circumstance was already taken into account in setting the proposed forfeiture level. Furthermore, it was incumbent upon Telepage to review its records to ensure compliance upon its becoming the transferee of the station.

5. Finally, we are not persuaded that the forfeiture amount assessed against Telepage is excessive and unduly harsh. Telepage did not submit any financial data to support its assertion that the assessed amount would place a strain on its operations. We thus find no basis upon which to reduce the $3,440.00 forfeiture.

IV. ORDERING PARAGRAPHS

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Telepage Communications, Inc. FORFEIT to the United States the sum of Three Thousand Four Hundred Forty Dollars ($3,440.00) for the violation of Section 22.3 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

7. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Telepage Communications, Inc. by Certified Mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

BART GONZALES d/b/a DIGITAL PAGING — File No. 63500-89-5-RPS

Notice of Apparent Liability for Forfeiture for operating a facility in an unauthorized manner with respect to Station KNKD553 in the Public Mobile Service at Amarillo, Texas

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1990; Released: July 31, 1990

By the Chief, Mobile Services Division:

1. Bart Gonzales d/b/a Digital Paging ("Gonzales") has filed a request seeking rescission or reduction of the $1,910.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (" *NALF* ") issued January 30, 1989.

I. BACKGROUND

2. Gonzales operated a facility on frequency 158.10 MHz at Amarillo, Texas, without timely filing his required FCC Form 405 renewal form. On November 8, 1988, Gonzalez filed a request for Special Temporary Authority ("STA") to continue to operate his station pending Commission action on his application for reinstatement of the expired authorization.

3. On January 30, 1989, the MSD issued the *NALF*, finding that an apparent violation of Section 22.3(b) of the Commission's Rules had occurred for operating Station KNKD553 at Amarillo, Texas, in an unauthorized manner in that Gonzalez had not filed its FCC Form 405 license renewal. In the *NALF*, the MSD imposed a forfeiture of $1,910.00, which was calculated by taking the forfeiture of $10.00 per day for the 191-day period from June 1, 1988 (the date 30 days prior to the July 1, 1989 filing deadline) to December 8, 1989 (the date of receipt of Gonzales' STA request).

II. GONZALES' CONTENTIONS

4. Gonzales argues that the $1,910.00 forfeiture should be rescinded or reduced. In support, Gonzales states: (1) that the forfeiture would be a significant hardship because, "Amarillo is a small town with four non-wireline and one wireline paging systems, of which I am the smallest. Competition is keen . . . and a forfeiture of $1910 is an undue burden and an unfair one . . . ." and (2) the amount of the forfeiture was incorrectly calculated by 300.00 because Gonzalez' operation between June 1, 1988, to July 1, 1988, was permitted under his authorization.

III. DISCUSSION

5. After reviewing the facts and Gonzales' contentions, we find that Gonzalez' statement, in the absence of any supporting evidence, is insufficient to support a claim of hardship. We agree, however, with Gonzales that the forfeiture was incorrectly calculated by $300.00. Therefore, we conclude that the forfeiture should be reduced to $1,610.00.

IV. ORDERING PARAGRAPHS

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Bart Gonzales d/b/a Digital Paging FORFEIT to the United States the sum of One Thousand Six Hundred Ten Dollars ($1,610.00) for the violation of Section 22.3(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

7. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Bart Gonzalez by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

SEMO MOBILE COMMUNICATIONS, INC. d/b/a BEEPTEL — File No. 63500-89-23-RPS

Notice of Apparent Liability for Forfeiture for failure to file notification with respect to Station KNKJ977 in the Public Mobile Service at Oriole, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: July 31, 1990

By the Chief, Mobile Services Division:

1. Semo Mobile Communications, Inc. d/b/a Beeptel ("Semo") has filed an "Application for Remission of Forfeiture" of the $3,190.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (" *NALF* ") issued June 5, 1989.

I. BACKGROUND

2. On July 1, 1987, the MSD granted Semo authority to construct and operate frequency 152.72 MHz base station facilities for Station KNKJ977 at Oriole, Missouri. Semo's authority expired on July 1, 1988. Semo failed to timely file its FCC Form 489 application to notify the Commission of completion of construction. On May 15, 1989, Semo filed a request for Special Temporary Authority ("STA") to continue to operate all facilities of Station KNKJ977, pending Commission action on Semo's application for reinstatement of the expired authorization. On June 5, 1989, the MSD issued the *NALF*, finding that an apparent violation of Section 22.3 of the Commission's Rules had occurred for operating a facility in an unauthorized manner, and imposed a forfeiture of $3,190.00.

II. SEMO'S CONTENTIONS

3. Semo argues that the $3,190.00 forfeiture is excessive and should be reduced. It acknowledges that it inadvertently failed to file its FCC Form 489 notifying that construction had been completed. It states that as soon as this oversight was discovered, it brought the matter to the Commission's attention and on May 9, 1989, it filed a request for waiver of Sections 22.43(a)(3) and 22.44(a)(2) to allow it to file an application for reinstatement of its license. Semo adds that when this request was denied, it filed a FCC Form 401 and its STA request.

4. Semo argues that three factors mitigate in favor of remission of the forfeiture: (1) its violation was unintentional; (2) it voluntarily disclosed the violation and took immediate remedial action; and (3) it has no prior history of rule violations. Semo also argues that payment of the $3,190.00 forfeiture would impose a significant economic burden on its operation. In support, Semo submits a copy of its 1988 "U.S. Income Tax Return for an S Corporation" which indicates that the company suffered a loss in excess of $10,000.00 for that year. Moreover, Semo points out that it has already spent nearly $2,000.00 in legal, engineering, and filing fees regarding new FCC Form 401 applications. Semo argues that the mitigating factors in its case are enough to warrant reduction of the forfeiture as was done in *Tri - County Telephone Co.*, 54 Rad. Reg. (P&F) 1065 (Com. Car. Bur. 1983) (" *Tri - County* ").

III. DISCUSSION

5. After reviewing the facts and Semo's contentions, we find no basis upon which to reduce the forfeiture. The fact that Semo's violation may have been unintentional does not alter the fact that unauthorized operation existed and that the violation continued over a period of time. We have previously noted that

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983).[1]

6. We also find Semo's economic hardship arguments unavailing. Semo's tax return for 1988 shows gross income of $139,400.00. In the absence of any other mitigating financial circumstances, we do not believe that Semo has demonstrated that the forfeiture of $3,190.00, or the fees it expends to rectify its violation, would result in financial hardship. Finally, we find that the totality of circumstances in this case distinguish it from *Tri-County*, and we, therefore, conclude that a remission of forfeiture has not been justified. Accordingly, we uphold the $3,190.00 forfeiture.

IV. ORDERING PARAGRAPHS

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Semo Mobile Communications Inc. d/b/a Beeptel FORFEIT to the United States the sum of Three Thousand One Hundred Ninety Dollars ($3,190.00) for the violation of Section 22.3 of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

8. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

9. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Semo Mobile Communications, Inc. d/b/a/ Beeptel by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] The fact that a licensee voluntarily notifies the Commission of a potential rule violation and takes remedial action are factors which are taken into account in setting the amount of forfeiture. In this case, these factors were taken into account in setting the proposed forfeiture. With reference to Semo's claim of having no prior history of rule violations, we note that Semo has also been assessed a $760.00 forfeiture for an apparent violation involving Station KNKC272 at Jackson, Missouri. *See* Notice of Apparent Liability for Forfeiture issued June 2, 1989 (File No. 63500-89-22-RPS), *application for remission pending*. Moreover, Semo's record was taken into account in setting the proposed forfeiture in the *NALF* herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-340

In the Matter of

Amendment of the Aviation Services
Rules concerning the frequency
tolerance for VHF aircraft radios.

NOTICE OF PROPOSED RULE MAKING

Adopted: July 23, 1990; Released: July 31, 1990

By the Commission:

I. INTRODUCTION

1. In a letter dated July 31, 1989, the Aircraft Owners and Pilots Association, the Experimental Aircraft Association, the General Aviation Manufacturers Association and the Helicopter Association International (hereafter petitioners) jointly petitioned the Commission to exclude all currently installed VHF aircraft radios from the maximum 30 parts per million (ppm) frequency tolerance requirement which was to have become effective on January 1, 1990. In order to provide time to study the petitioners' request, the Chief, Private Radio Bureau, extended the effective date of the requirement until January 1, 1992.[1] This *Notice of Proposed Rule Making* (*Notice*) addresses the merits of the petitioners' request.

II. BACKGROUND

2. In an *Order* released May 22, 1984, FCC 84-220, 49 Fed. Reg. 21737 (1984), the Commission amended Section 87.65 of the Rules, 47 C.F.R. § 87.65, to change the frequency tolerance requirements for aircraft radio stations operating in the frequency bands from 100 MHz to 470 MHz.[2] Under the new rules 30 ppm is the maximum frequency tolerance permitted after January 1, 1985, for new and replacement transmitters and for all transmitters operating in this band after January 1, 1990. The effect of this rule was to require modification or replacement of all aircraft transmitters operating in the 100 MHz to 470 MHz band that do not meet the 30 ppm frequency tolerance by January 1, 1990. [3]

3. In adopting the 30 ppm frequency tolerance in 1984, the Commission stated its intention was to conform Part 87 of the Rules to the Final Acts of the World Administrative Radio Conference, Geneva, 1979 (WARC 79). The Commission pointed out that the proposed frequency tolerance was published in the *Fifth Notice of Inquiry* in General Docket 80-739, FCC 82-213, 47 Fed. Reg. 25982 (1982), and that no comments were received regarding the proposed frequency tolerance. Further, the Commission noted that the proposed frequency tolerance standard was consistent with the three-phase plan of the Federal Aviation Administration (FAA) to implement 25 kHz channel spacing in the 118-136 MHz band. No petitions for reconsideration of this action were received.

4. In support of its petition, petitioners argue that the broad ramifications of this action of obsoleting VHF aircraft radios with a 50 ppm frequency tolerance were not considered. In this regard, petitioners estimate that as many as 93,000 radios are currently installed in the general aviation fleet that do not meet the new tolerance requirement. Petitioners point out that these radios are installed in small, single-engine, piston-powered aircraft which are primarily operated in relatively remote areas of the United States where they would not interfere with other U.S. or foreign radios employing the 30 ppm tolerance. The petitioners argue that the cost of replacing these radios which they estimate to be approximately $1200, or the cost of modifying them which they estimate to be between $450 and $650, frequently will exceed the radio's market value. Further, the petitioners state that the international Radio Regulations do not require all installed aircraft radios to meet a 30 ppm requirement by January 1, 1990. They note that footnote 28 to Appendix 7 of the international Radio Regulations permits installed aircraft radios with channel spacing of 50 kHz to continue to operate with a frequency tolerance of 50 ppm.[4] The petitioners indicate that they support the policy articulated in footnote 28 to Appendix 7 and state that nearly all the aircraft radios in question have 50 kHz channel spacing.

III. DISCUSSION

5. As noted above, no comments or objections were received when the Commission proposed and adopted a cut-off date for using VHF aircraft radios with a 50 ppm frequency tolerance. Because the actions were taken in the broad context of implementing WARC 79, however, it appears that the aviation industry did not specifically focus on this provision at the time. For these reasons and because of the large number of radios which would be made obsolete by retaining the current cut-off date, we decided to reexamine this issue.

6. A 50 ppm frequency tolerance is associated with older radios, radios that are designed to transmit and receive on channels spaced every 50 kHz (360 channels). Radios designed to transmit and receive on 100 kHz spaced channels (180 channels), generally, meet a frequency tolerance of 100 ppm. A 30 ppm frequency tolerance is generally associated with radios that are designed to operate on 25 kHz spaced channels (720 channels). Thus, the real issue here is the cost to the general aviation community of modifying or replacing radios with a 50 ppm frequency tolerance versus the Commission's and FAA's efforts to implement 25 kHz channelization nationwide.[5]

7. In Docket 19647 the Commission adopted a *Report and Order* which provided for 25 kHz channel spacing in the 117.975-136 MHz aviation band.[6] There the Commission was faced with the problem of trying to improve aeronautical communication capabilities while at the same time providing fairly for the equity that general aviation operators had in equipment employing 50 kHz channels. Because a dual environment, 25 kHz and 50 kHz, was possible and lacking a definitive FAA implementation program establishing a time for total system conversion to 25 kHz, the Commission decided not to establish a cut-off date for operation of 50 kHz equip-

ment. Instead, it established a cut-off date for type acceptance of new equipment employing 50 kHz bandwidth channels and required new transmitters to meet a 25 kHz bandwidth.[7]

8. There are still areas of the country where 25 kHz equipment has not been implemented at ground stations and no definite FAA cut-off date has been established to implement 25 kHz in these areas. While we strongly support 25 kHz channelization nationwide, absent an interference complaint or a definitive FAA nationwide implementation date, we do not believe it necessary to obsolete the use of previously installed 50 kHz equipment. For these reasons, we are proposing to allow currently installed aircraft radios operating in the 100 MHz-470 MHz band and employing 50 kHz channels and a 50 ppm tolerance to be used indefinitely. Our intention here is to relieve general aviation aircraft owners operating in areas where 25 kHz channels have not been implemented yet at ground stations from a requirement to prematurely purchase new radios. As the FAA implements 25 kHz ground stations on a broader basis the individual flying habits of aircraft operators will dictate when older radios have to be replaced. Those utilizing the FAA's services will have to voluntarily switch to the newer radios or risk air traffic delays. Conversely, aircraft operators with no need for communications on 25 kHz spaced channels will be able to use previously installed 50 kHz channelled equipment indefinitely.

9. This proposal is consistent with footnote 28 to Appendix 7 of the international Radio Regulations. The international Radio Regulations, however, do not permit aircraft radios with 100 kHz channel spacing to continue to operate with the 50 ppm frequency tolerance. Further, the petitioners note that nearly all of the subject general aviation radios have 50 kHz spaced channels. Therefore, we do not propose to permit the continued use of aircraft radios with 100 kHz channel spacing.

10. While we are proposing to grandfather installed VHF aircraft radio equipment channelized for 50 kHz and employing a 50 ppm tolerance indefinitely, we emphasize here that the FAA is continuing to implement 25 kHz channels nationwide in the air traffic control system. Aircraft flying into airspace which is under control of ground stations operating on 25 kHz channels should have equipment channelized for 25 kHz otherwise they may encounter rerouting and other delays. Further, in keeping with the Commission's responsibility to manage spectrum efficiently we will continue to assign 25 kHz spaced channels for aeronautical advisory stations (Unicoms).[8] As frequency congestion problems and requirements for new aviation radio services continue to grow, it is inevitable that all general aviation aircraft must equip with 25 kHz channel radios.

IV. PROCEDURAL MATTERS

11. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase burden hours imposed on the public.

12. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this rule making proceeding because, if promulgated, it will not have a significant economic impact on a substantial number of small entities. The proposed rule would allow the continued use of previously installed aircraft radios. This usage should not affect existing aviation communications.

13. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

14. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

15. Any person who is making an oral *ex parte* presentation that presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact than an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

16. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **September 24, 1990** and reply comments on or before **October 9, 1990.** All relevant and timely comments will be considered by the Commission before taking final action in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C.

20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

17. IT IS ORDERED that a copy of this *Notice* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

Part 87 - Aviation Services.

1. The authority citation for Part 87 continues to read as follows:

AUTHORITY: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 501-609.

2. Section 87.133(a) is amended by adding a reference to footnote 10 in paragraphs (a)(5) and (a)(6), and adding a new footnote 10 to the footnote table to read as follows:

§ 87.133 Frequency stability.

(a) * * *

(5) Band - 100-137 MHz:			
Aeronautical stations	[4]50	20	
Emergency locator transmitter text stations	50	50	
Survival craft stations on 121.5 MHz	50	50	
Emergency locator stations	50	50	
Aircraft and other mobile stations in the Aviation Services	50 [5]	30	[10]
Radio navigator stations	20	20	
(6) Band - 137 to 470 MHz:			
Aeronautical stations	50	20	
Survival craft stations on 243 MHz	50	50	
Aircraft stations	50 [5]	30	[10]

* * * * *

[10]For transmitters with 50 kHz channel spacing installed before January 2, 1985 the maximum tolerance is 50 parts in 10^6.

* * * * *

FOOTNOTES

[1] *See* Order released September 22, 1989, DA 89-1208.

[2] Section 87.65 of the Rules has since been recodified as Section 87.133, 47 C.F.R. § 87.133. *See* 53 Fed. Reg. 28940 (1988).

[3] As noted above, this date has been extended to January 2, 1992.

[4] The international Radio Regulations, however, do not permit aircraft radios with 100 kHz channel spacing to continue to operate with the 50 ppm frequency tolerance. These older radios were designed to operate on channels spaced every 100 kHz in the 117.975-136 MHz band (180 channels).

[5] The Commission began the transition to 25 kHz channel spacing in 1971 and has continued to implement 25 kHz channels as the need arises. *See*, for example, Docket No. 18531, 31 FCC 2d 193 (1971) and PR Docket No. 87-214, 3 FCC Rcd 4171 (1988). The FAA first announced its intention to implement 25 kHz channels for general aviation in 1973, 38 Fed. Reg. 29077 (1973).

[6] Report and Order, Docket 19647, 38 Fed. Reg. 29077 (October 19, 1973).

[7] In a Notice of Proposed Rule Making, Gen. Docket No. 89-295, 4 FCC Rcd 5224 (1989), the Commission proposed alloting 40 additional 25 kHz spaced channels in the 136-137 MHz band for the Aviation Services.

[8] *See*, Report and Order, PR Docket No. 87-214, 3 FCC Rcd 4171 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MILLICOM TELECOMMUNICATIONS SERVICES, INC. File No. I-T-C-90-099

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 25, 1990; Released: July 31, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on April 11, 1990 by Millicom Telecommunications Services, Inc. (MTS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on May 16, 1990. No comments were received.

2. The applicant is a non-dominant domestic resale common carrier. It now proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] Upon review of the subject application we find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by MTS.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-90-099 IS GRANTED, and MTS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and Cable and Wireless Communications, Inc.'s Tariff F.C.C. No. 3 between the United States and the overseas points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE HAWAIIAN TELEPHONE CO., INC. File No. I-T-C-90-104

Application for authority to provide private line service between Hawaii and various overseas points.

ORDER AND AUTHORIZATION

Adopted: July 25, 1990; Released: July 31, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on April 16, 1990 by GTE Hawaiian Telephone Company (HTC), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to use previously authorized facilities to provide private line service between Hawaii and various overseas points already served by HTC. The application was placed on public notice on May 16, 1990. No comments were received. Upon consideration of the application, we find that a grant of the application is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-104 IS GRANTED, and HTC is authorized to use its previously authorized facilities to provide private line service between Hawaii, on the one hand, and Taiwan, Singapore, Palau, Canada, Federal Republic of Germany, Malaysia and Papua New Guinea, on the other hand.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between HTC and its correspondents, and copies of the agreements shall be filed with the Commission within 30 days of their execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

U.S. Central, Inc. File No: 23001-CD-P/L-01-87

For authority to construct new one-way paging facilities on operating frequency 35.66 MHz in the Domestic Public Land Mobile Radio Service at Sacramento, California.

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 1990; Released: July 31, 1990

By the Commission:

1. U.S. Central, Inc. (Central) has filed an application for review of an order of the Common Carrier Bureau denying reinstatement of its application for a new one way paging facility on frequency 35.66 MHz at Sacramento, California. No responsive pleadings were filed.

I. BACKGROUND AND ARGUMENT

2. Central filed its application for frequency 35.66 MHz at Sacramento, California on March 20, 1987. On September 22, 1987, the Mobile Services Division (MSD) returned Central's application because it was mutually exclusive by reason of co-channel electrical interference with the applications of B.W. Communications, Inc. (B.W.) (File Nos. 22287- and 22288-CD-P-1-82) and was filed after the cut-off date for filing mutually exclusive applications with B.W.'s pending applications.[1] In dismissing Central's application, the MSD stated that pursuant to a settlement agreement in the A.S.D. proceeding,[2] B.W. agreed to dismiss all of its low band paging applications. [3] It noted, however, that because a petition for reconsideration of the *A. S. D. Settlement Order* and an appeal of the decision to the D.C. Circuit Court of Appeals remained outstanding, the *Settlement Order* had not become final. Thus, B.W.'s applications had not actually been dismissed and new applications for the frequencies could not be accepted. Central requested reconsideration of the MSD decision by the Chief, Common Carrier Bureau. That decision, issued February 5, 1988, affirmed the return of Central's application.[4]

3. Some background on the *A. S. D. Settlement Order* would be helpful in understanding the present proceeding. The *A. S. D. Settlement Order* involved applications filed by A.S.D. Answer Service, Inc. (A.S.D.), B.W., Vineyard Communications, Inc., (Vineyard) and P.A.L. Communications Systems, Inc. (P.A.L.) (collectively referred to as applicants) for new paging facilities in the domestic public land mobile radio service (DPLMRS). Applicants filed over 600 applications to operate on 35 and 43 MHz frequencies in approximately 50 markets. The Commission found reason to believe that Graphic Scanning Corp. (Graphic) was the real party in interest behind the applications, and that the applicants and/or Graphic exhibited a lack of candor or intentionally misrepresented material facts to the Commission. The applications were designated for a hearing on these issues, *Order Designating Applications for Hearing*, 47 Fed. Reg. 40896 (Sept. 16, 1982).

4. In an initial decision, FCC 85D-3 (January 9, 1985), the Administrative Law Judge (ALJ) found that Graphic Scanning was indeed the real party in interest behind the applications. The ALJ concluded that the applicants are not qualified to be Commission licensees and, therefore, denied their applications. To bring about a resolution of this complex proceeding, Graphic asked the Commission to approve a settlement agreement. The Commission approved the agreement in the *A. S. D. Settlement Order*, which included, *inter alia*, an agreement by the applicants, including B.W., to dismiss all of their pending low-band paging applications.

5. Graphic's former Chairman, Barry Yampol, filed a petition for reconsideration of the *A. S. D. Settlement Order* and Pocono Mobile Radio filed an application for review, both of which were denied in *A. S. D. Answer Service*, *supra* note 2. The *Settlement Order* was subsequently affirmed on appeal. *Mobilfone of Northeastern Pennsylvania, Inc. v. FCC*, *supra* note 2.

6. According to Central, the MSD staff and the Bureau erred in returning its application because (1) the *A. S. D. Settlement Order* was effective and not stayed or suspended; and (2) that with respect to the dismissal of the B.W. applications, the Commission's action had become final and unappealable. Central argues that the staff's assumption that the *Order* is not final until all petitions for reconsideration and appeals to the court are concluded is inconsistent with the Communications Act and with the Commission's own rules and regulations.[5] Central emphasizes that of the parties that appealed the decision before the Commission and in the court, not one questioned the agreement to dismiss the B.W. applications. Accordingly, Central contends that as to B.W., the Commission's order became effective when published and is no longer subject to agency or judicial review. Central points out that the statutory deadlines for seeking rehearing or court review passed with no request pertaining to B.W. having been filed and that B.W. itself has treated the Commission's action as final because it did not contest Central's application.

II. DISCUSSION

7. Central's applications for the above-described low-band paging frequencies were properly dismissed by the MSD and the Bureau. Under §22.31(d) of the Commission's rules, an application mutually exclusive with one or more previously filed applications which is filed after the cut-off date will be returned as defective and will be eligible for refiling only after final action is taken by the Commission on the first filed application.[6] In this case, Central filed its application after the appropriate cut-off date. Moreover, final action had not been taken on B.W.'s applications. Central's filing, therefore, could not be accepted. Central's fundamental argument -- that the Commission's Order approving the settlement agreement became final and unappealable as to B.W.'s applications -- is erroneous.

8. We agree with Central's argument that the Communications Act and Commission rules do not provide for stays or postponement of orders without special order of the Commission. However, in this case there was a special order of the Commission, *see A. S. D. Settlement Order, supra* note 2, approving a settlement agreement whereby B.W. agreed to dismiss its applications. By its terms, this agreement does not become effective until the Commission's Order becomes final and unappealable. B.W. has therefore been under no obligation to dismiss its applications. Indeed, it is possible that an appeal could have resulted in a nullification of the settlement agreement, and could have directly affected B.W.'s pending applications.[7] Under these circumstances, no new applications for which B.W. had pending mutually exclusive applications could be accepted, and the Bureau correctly dismissed Central's application.

9. We observe that, at this time, the Commission's Order is final and unappealable. No appeals are currently pending and the period within which a party could seek certiorari of *Mobilfone of Northeastern Pennsylvania, supra* note 2, has passed. B.W.'s applications should therefore be dismissed and by this order are dismissed with prejudice. In an effort to prevent further delay of service to the public, the staff wrote to the applicants on March 7, 1989 (prior to exhaustion of all appeal rights in the A.S.D. proceeding), asking them to respond within 20 days of the date of the correspondence whether they wished their applications to remain on file or whether they would dismiss the applications in question.[8] Under 47 C.F.R. § 22.28(c), the applicants were advised that failure to respond to the letter would result in the dismissal of their applications for failure to prosecute. P.A.L. consented to the dismissal of any and all of its applications involved in the *A. S. D.* proceeding. The other applicants have not responded to date. Thus, the applications of P.A.L., A.S.D., B.W., and Vineyard pending as a result of the *A.S.D.* proceeding are hereby dismissed with prejudice. Hence, Central and any other interested parties may now file new applications for any frequencies which have become available as a result of these dismissals.

10. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by U.S. Central, Inc. IS DENIED.

11. IT IS FURTHER ORDERED that the applications of A.S.D. Answer Service, Inc., B.W. Communications, Inc., P.A.L. Communications Systems, Inc., and Vineyard Communications, Inc. listed in the attached appendix ARE DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

A.S.D. Answer Service, Inc.:

21164-CD-P-03-82	San Diego	CA
21292-CD-P-17-82	Stamford	CT
21084-CD-P-06-82	San Jose	CA
23270-CD-P-01-82	Hancock	MA
23272-CD-P-01-82	North Greenbush Twsp	NY
23271-CD-P-01-82	Schenectady	NY
21292-CD-P-17-82	Trumbull	CT
21117-CD-P-07-82	Tampa	FL
21100-CD-P-03-82	Burnsville	MN
21114-CD-P-04-82	St. Louis	MO
21292-CD-P-17-82	New York	NY
21113-CD-P-06-82	Cleveland	OH
21102-CD-P-06-82	Dallas	TX
21101-CD-P-03-82	Seattle	WA
23194-CD-P-01-82	Little Rock	AR
21082-CD-P-04-82	Phoenix	AZ
21094-CD-P-09-82	Los Angeles	CA
21287-CD-P-01-82	Glastonbury	CT
21086-CD-P-06-82	Wilmington	DE
21116-CD-P-06-82	Miami	FL
21116-CD-P-06-82	West Palm Beach	FL
21297-CD-P-06-82	Atlanta	GA
23269-CD-P-01-82	Cedar Rapids	LA
23268-CD-P-01-82	Waterloo	IA
23190-CD-P-01-82	Boise	ID
21083-CD-P-11-82	Arlington Heights	IL
20976-CD-P-03-82	Chicago	IL
21083-CD-P-11-82	Chicago	IL
23267-CD-P-01-82	Decatur	IL
21096-CD-P-12-82	Pontiac	MI
23266-CD-P-01-82	Billings	MT
21287-CD-P-01-82	Windham	NH
23191-CD-P-02-82	Reno	NV
21085-CD-P-03-82	Cincinnati	OH
21096-CD-P-12-82	Holland	OH
21096-CD-P-12-82	Toledo	OH
23056-CD-P-01-82	Tulsa	OK
21095-CD-P-09-82	Bell Township	PA
21086-CD-P-06-82	Philadelphia	PA
21287-CD-P-01-82	Cumberland	RI
21151-CD-P-03-82	Nashville	TN
21294-CD-P-10-82	Houston	TX
23193-CD-P-01-82	Spokane	WA
21083-CD-P-11-82	Milwaukee	WI
21083-CD-P-11-82	Homewood	IL
23464-CD-P-01-82	Peoria Heights	IL
21083-CD-P-11-82	Schaumburg	IL
20976-CD-P-03-82	Warren Township	IL
21083-CD-P-11-82	Hammond	IN
23182-CD-P-01-82	Topeka	KS
21076-CD-P-01-82	New Orleans	LA
21287-CD-P-01-82	Boston	MA

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21154-CD-P-03-82	Baltimore	MD
21096-CD-P-12-82	Detroit	MI

B.W. Communications, Inc.:

21202-CD-P-17-82	New York	NY
23257-CD-P-01-82	North Greenbush Twsp	NY
23253-CD-P-01-82	Schenectady	NY
21000-CD-P-01-82	Batava	OH
20922-CD-P-01-82	Cincinnati	OH
20998-CD-P-01-82	Cincinnati	OH
21203-CD-P-08-82	Glastonbury	CT
21202-CD-P-17-82	Stamford	CT
21202-CD-P-17-82	Trumbull	CT
21206-CD-P-06-82	Wilmington	DE
20989-CD-P-01-82	Bonita Springs	FL
20930-CD-P-01-82	Ft. Myers	FL
20993-CD-P-01-82	Largo	FL
20921-CD-P-01-82	Miami	FL
20929-CD-P-01-82	Miami	FL
20938-CD-P-01-82	Miami	FL
20941-CD-P-01-82	Miami	FL
20939-CD-P-01-82	North Miami Beach	FL
21001-CD-P-01-82	Sarasota	FL
20988-CD-P-01-82	Tampa	FL
20919-CD-P-01-82	West Palm Beach	FL
21194-CD-P-06-82	Atlanta	GA
23262-CD-P-01-82	Cedar Rapids	IA
23254-CD-P-01-82	Waterloo	IA
23265-CD-P-01-82	Boise	ID
20996-CD-P-01-82	Arlington Heights	IL
21005-CD-P-01-82	Batavia	IL
23898-CD-P-01-82	Champaign	IL
20994-CD-P-01-82	Chicago	IL
21002-CD-P-01-82	Chicago	IL
21004-CD-P-01-82	Crystal Lake	IL
23899-CD-P-01-82	Danville	IL
23255-CD-P-01-82	Decatur	IL
20944-CD-P-01-82	Evanston	IL
21017-CD-P-01-82	Homewood	IL
21009-CD-P-01-82	Lockport	IL
21003-CD-P-01-82	Oakbrook	IL
21008-CD-P-01-82	Oaklawn	IL
23538-CD-P-01-82	Peoria Heights	IL
20995-CD-P-01-82	Schaumburg	IL
23540-CD-P-01-82	Springfield	IL
21011-CD-P-01-82	Warren Township	IL
20987-CD-P-01-82	Hammond	IN
23263-CD-P-01-82	Baton Rouge	LA
20933-CD-P-01-82	New Orleans	LA
21203-CD-P-08-82	Boston	MA
23973-CD-P-02-82	Bettendorf	IA
23539-CD-P-01-82	Wichita	KS
23013-CD-P-01-82	Tulsa	OK

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20991-CD-P-01-82	Naples	FL
22290-CD-P-01-82	Grass Valley	CA
22289-CD-P-01-82	Lodi	CA
22291-CD-P-01-82	Rancho Cordova	CA
22288-CD-P-01-82	Roseville	CA
22287-CD-P-01-82	Sacramento	CA
22286-CD-P-01-82	Stockton	CA
22303-CD-P-01-82	Jacksonville	FL
22297-CD-P-01-82	Orlando	FL
22298-CD-P-01-82	Orlando	FL
22299-CD-P-01-82	Winter Garden	FL
22293-CD-P-02-82	Kansas City	KS
22292-CD-P-01-82	Kansas City	MO
22294-CD-P-01-82	Apex	NC
22295-CD-P-01-82	Summerfield	NC
22300-CD-P-01-82	Portland	OR
22301-CD-P-01-82	Memphis	TN
22302-CD-P-01-82	Bee Cave	TX
22285-CD-P-01-82	Bingham	UT
22282-CD-P-01-82	Odgen	UT
22283-CD-P-01-82	Provo	UT
22284-CD-P-01-82	Salt Lake City	UT
23293-CD-P-01-82	Reno	NV
23259-CD-P-01-82	Little Rock	AR
21200-CD-P-04-82	Phoenix	AZ
20937-CD-P-01-82	Dale City	CA
21198-CD-P-03-82	El Cajon	CA
21197-CD-P-09-82	Los Angeles	CA
20934-CD-P-01-82	Mt. Diablo	CA
21197-CD-P-09-82	Newport Beach	CA
20936-CD-P-01-82	Oakland Hills	CA
21198-CD-P-03-82	San Diego	CA
21198-CD-P-03-82	San Diego	CA
20935-CD-P-01-82	San Francisico	CA
20928-CD-P-01-82	San Jose	CA
21196-CD-P-12-82	Detroit	MI
21877-CD-P-01-82	Burnsville	MN
21879-CD-P-01-82	Lino Lakes	MN
21878-CD-P-01-82	Solderville	MN
20990-CD-P-01-82	Clayton	MO
20920-CD-P-01-82	St. Lowis	MO
23256-CD-P-01-82	Billings	MT
21253-CD-P-08-82	Windham	MN
21206-CD-P-06-82	Camden	NJ
21206-CD-P-06-82	Trenton	NJ
23261-CD-P-01-82	Virginia City	NV
21204-CD-P-06-82	Cleveland	OH
21006-CD-P-01-82	Dayton	OH
20999-CD-P-01-82	Fairfield	OH
20932-CD-P-01-82	San Jose	CA
21197-CD-P-09-82	Santa Ana	CA
21199-CD-P-02-82	Boulder	CO
23258-CD-P-01-82	Hancock	MA
21195-CD-P-03-82	Baltimore	MD

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23264-CD-P-01-82	Spokane	WA
20201-CD-P-03-82	Tacoma	WA
21007-CD-P-01-82	Milwaukee	WI
21015-CD-P-01-82	Arlington	TX
20201-CD-P-03-82	Seattle	WA
20201-CD-P-03-82	Snohomish	WA
20986-CD-P-01-82	Arlington	TX
20942-CD-P-01-82	Beaumont	TX
21016-CD-P-01-82	Bedford	TX
20945-CD-P-01-82	Dallas	TX
20926-CD-P-01-82	Deer Park	TX
21014-CD-P-01-82	Fort Worth	TX
20923-CD-P-01-82	Houston	TX
20940-CD-P-01-82	Houston	TX
20946-CD-P-01-82	Houston	TX
21013-CD-P-01-82	Little El	TX
20925-CD-P-01-82	Oyster Creek	TX
20918-CD-P-01-82	Port Bolivar	TX
20924-CD-P-01-82	Stafford	TX
20931-CD-P-01-82	Wallisville	TX
20943-CD-P-01-82	Wigginsville	TX
21204-CD-P-06-82	Painesville	OH
20992-CD-P-01-82	Sycamore	OH
21196-CD-P-12-82	Toledo	OH
21206-CD-P-06-82	Bacton Hill	PA
21205-CD-P-06-82	Bell Township	PA
21206-CD-P-06-82	Philadelphia	PA
21253-CD-P-03-82	Cumberland	RI
21196-CD-P-12-82	Holland	OH
20927-CD-P-01-82	Maimisburg	OH
20997-CD-P-01-82	Middleton	OH

P.A.L. Communications Systems, Inc.:

21280-CD-P-03-82	Solderville	MN
20761-CD-P-01-82	Maryland	MO
20760-CD-P-01-82	St. Louis	MO
20762-CD-P-01-82	St. Louis	MO
23170-CD-P-02-82	Schenectady	NY
20769-CD-P-01-82	Batavia	OH
20767-CD-P-01-82	Cincinnati	OH
20768-CD-P-01-82	Cincinnati	OH
21281-CD-P-06-82	Cleveland	OH
20770-CD-P-01-82	Hamilton	OH
21289-CD-P-12-82	Holland	OH
20771-CD-P-01-82	Sycamore	OH
21289-CD-P-12-82	Toledo	OH
23014-CD-P-01-82	Tulsa	OK
21276-CD-P-09-82	Pittsburgh	PA
21293-CD-P-03-82	Nashville	TN
21271-CD-P-06-82	Arlington	TX
21273-CD-P-10-82	Beaumont	TX
21271-CD-P-06-82	Dallas	TX
21273-CD-P-10-82	Houston	TX

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20772-CD-P-01-82	Middleton	OH
23175-CD-P-01-82	Boise	ID
23174-CD-P-01-82	Baton Rouge	LA
23177-CD-P-02-82	Reno	NV
23176-CD-P-02-82	Spokane	WA
20796-CD-P-01-82	Sarasota	FL
20781-CD-P-01-82	Addison	IL
23168-CD-P-01-82	Little Rock	AR
20765-CD-P-02-82	Mesa	AZ
20764-CD-P-01-82	Phoenix	AZ
20763-CD-P-01-82	Tucson	AZ
20765-CD-P-02-82	Tucson	AZ
21279-CD-P-06-82	Daly City	CA
21288-CD-P-09-82	Los Angeles	CA
21279-CD-P-06-82	Mt. Diablo	CA
21097-CD-P-17-82	New York	NY
20766-CD-P-02-82	Dayton	OH
21282-CD-P-06-82	Wilmington	DE
23169-CD-P-01-82	Billings	MT
21282-CD-P-06-82	Philadelphia	PA
21278-CD-P-08-82	Boston	MA
21273-CD-P-10-82	Wigginsville	TX
21272-CD-P-03-82	Seattle	WA
20759-CD-P-01-82	Clayton	MO
20774-CD-P-01-82	Homewood	IL
21277-CD-P-03-82	San Diego	CA
21288-CD-P-09-82	Newport Beach	CA
21274-CD-P-02-82	Boulder	CO
20795-CD-P-01-82	Bonita Springs	FL
21286-CD-P-01-82	Jacksonville	FL
21275-CD-P-03-82	Orlando	FL
20794-CD-P-01-82	West Palm Beach	FL
21275-CD-P-03-82	Winter Garden	FL
20799-CD-P-01-82	Atlanta	GA
20802-CD-P-01-82	Atlanta	GA
20803-CD-P-01-82	College Park	GA
20798-CD-P-01-82	Douglasville	GA
20800-CD-P-01-82	Marietta	GA
20801-CD-P-01-82	Sunnyside	GA
23164-CD-P-01-82	Cedar Rapids	IA
23165-CD-P-01-82	Waterloo	IA
20784-CD-P-01-82	Arlington Heights	IL
20782-CD-P-01-82	Batavia	IL
20783-CD-P-01-82	Chicago	IL
20780-CD-P-01-82	Crystal Lake	IL
23166-CD-P-01-82	Decatur	IL
20778-CD-P-01-82	Evanston	IL
20775-CD-P-01-82	Lockport	IL
20773-CD-P-01-82	Oaklawn	IL
23364-CD-P-01-82	Peoria Heights	IL
20777-CD-P-01-82	Schaumburg	IL
20779-CD-P-01-82	Warren Township	IL
20776-CD-P-01-82	Hammond	IN
23167-CD-P-01-82	Topeka	KS

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23480-CD-P-01-82	Wichita	KS
20797-CD-P-01-82	New Orleans	LA
23361-CD-P-01-82	Pittsfield	MA
21285-CD-P-03-82	Baltimore	MD
21289-CD-P-12-82	Detroit	MI
21280-CD-P-03-82	Lino Lakes	MN
20793-CD-P-01-82	Miami	FL
20791-CD-P-01-82	Naples	FL
20789-CD-P-01-82	Ft. Myers	FL
20785-CD-P-01-82	Largo	FL
20786-CD-P-01-82	Miami	FL
20790-CD-P-02-82	Miami	FL
20788-CD-P-01-82	North Miami Beach	FL
20787-CD-P-01-82	Tampa	FL
20792-CD-P-01-82	Venice	FL
23849-CD-P-01-82	Champaign	IL
23913-CD-P-01-82	Danville	IL
23851-CD-P-01-82	Springfield	IL

Vineyard Communications, Inc.:

20689-CD-P-01-82	Middleton	OH
21239-CD-P-01-82	North Olmsted	OH
21243-CD-P-01-82	Painesville	OH
20695-CD-P-01-82	Sycamore	OH
21253-CD-P-01-82	Toledo	OH
23053-CD-P-01-82	Tulsa	OK
21157-CD-P-01-82	Bacton Hill	PA
21156-CD-P-01-82	Penndel	PA
21155-CD-P-01-82	Philadelphia	PA
21270-CD-P-09-82	Pittsburgh	PA
21231-CD-P-01-82	Cumberland	RI
21216-CD-P-01-82	Nashville	TN
21217-CD-P-02-82	Nashville	TN
21268-CD-P-06-82	Dallas	TX
21267-CD-P-10-82	Houston	TX
21219-CD-P-01-82	Seattle	WA
21220-CD-P-01-82	Snohomish	WA
23198-CD-P-01-82	Spokane	WA
21218-CD-P-01-82	Tacoma	WA
20687-CD-P-01-82	Milwaukee	WI
21222-CD-P-01-82	Beltsville	MD
23279-CD-P-01-82	Decatur	IL
20681-CD-P-01-82	Oaklawn	IL
23298-CD-P-02-82	Reno	NV
21227-CD-P-01-82	Atlanta	GA
20651-CD-P-01-82	New Orleans	LA
21236-CD-P-01-82	Boston	MA
21234-CD-P-01-82	Framingham	MA
23275-CD-P-01-82	Hancock	MA
21233-CD-P-01-82	Kingston	MA
21237-CD-P-01-82	Needham	MA
21235-CD-P-01-82	Paxton	MA
21224-CD-P-02-82	Baltimore	MD

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21223-CD-P-01-82	Harwood	MD
21249-CD-P-01-82	Detroit	MI
21252-CD-P-01-82	Inkster	MI
21246-CD-P-01-82	Lincoln Park	MI
21244-CD-P-01-82	Mt. Clemens	MI
21248-CD-P-01-82	Pontiac	MI
21247-CD-P-01-82	Richmond	MI
21254-CD-P-01-82	Southfield	MI
21250-CD-P-01-82	Troy	MI
21245-CD-P-01-82	Ypsilanti	MI
21161-CD-P-01-82	Burnsville	MN
21162-CD-P-01-82	Lino Lakes	MN
21163-CD-P-01-82	Solderville	MN
20652-CD-P-01-82	Clayton	MO
20685-CD-P-01-82	Maryland Heights	MO
20684-CD-P-01-82	St. Louis	MO
20686-CD-P-01-82	St. Louis	MO
23277-CD-P-01-82	Billings	MT
21230-CD-P-01-82	Windham	MH
21159-CD-P-01-82	Camden	NJ
21269-CD-P-18-82	Newark	NJ
21158-CD-P-01-82	Trenton	NJ
23173-CD-P-01-82	Reno	NV
23200-CD-P-01-82	Virginia City	NV
21269-CD-P-18-82	New York	NY
23273-CD-P-01-82	No. Greenbush Township	NY
23274-CD-P-01-82	Schenectady	NY
21256-CD-P-01-82	Magic Mountain	CA
21257-CD-P-03-82	Mt. Diablo	CA
21266-CD-P-02-82	Newport Beach	CA
21258-CD-P-01-82	Oakland Hills	CA
21259-CD-P-02-82	Pomona	CA
21264-CD-P-03-82	Rollings Hills	CA
21263-CD-P-02-82	San Bernardino	CA
21262-CD-P-01-82	San Diego	CA
21266-CD-P-02-82	San Diego	CA
21264-CD-P-03-82	San Francisco	CA
21259-CD-P-02-82	San Jose	CA
21260-CD-P-01-82	San Jose	CA
21265-CD-P-01-82	Santa Ana	CA
21261-CD-P-01-82	Van Nuys	CA
21215-CD-P-01-82	Boulder	CO
21214-CD-P-01-82	Morrison	CO
21232-CD-P-01-82	Glastonbury	CT
21160-CD-P-01-82	Wilmington	DE
20701-CD-P-01-82	Bonita Springs	FL
20707-CD-P-01-82	Ft. Myers	FL
20699-CD-P-01-82	Miami	FL
20704-CD-P-01-82	Miami	FL
20705-CD-P-01-82	Miami	FL
20710-CD-P-01-82	Naples	FL
20700-CD-P-01-82	Sarasota	FL
20703-CD-P-01-82	Tampa	FL
20709-CD-P-01-82	Venice	FL

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20704-CD-P-01-82	West Palm Beach	FL
21221-CD-P-01-82	Atlanta	GA
21225-CD-P-01-82	College Park	GA
21229-CD-P-01-82	Douglasville	GA
21226-CD-P-01-82	Marietta	GA
21228-CD-P-01-82	Sunnyside	GA
23966-CD-P-02-82	Bettendorf	IA
23276-CD-P-01-82	Cedar Rapids	IA
23278-CD-P-01-82	Waterloo	IA
23171-CD-P-01-82	Boise	ID
20678-CD-P-01-82	Addison	IL
20676-CD-P-01-82	Arlington Heights	IL
20680-CD-P-01-82	Batavia	IL
23897-CD-P-02-82	Champaign	IL
20679-CD-P-02-82	Chicago	IL
20679-CD-P-02-82	Chicago	IL
20683-CD-P-01-82	Crystal Lake	IL
23897-CD-P-02-82	Danville	IL
23966-CD-P-02-82	East Moline	IL
20677-CD-P-01-82	Evanston	IL
21241-CD-P-01-82	Copley	OH
20702-CD-P-01-82	North Miami Beach	FL
20706-CD-P-01-82	Largo	FL
20698-CD-P-01-82	Phoenix	AZ
20708-CD-P-01-82	Miami	FL
23199-CD-P-01-82	Little Rock	AR
20696-CD-P-01-82	Tucson	AZ
20697-CD-P-01-82	Tucson	AZ
21264-CD-P-03-82	Daly City	CA
21257-CD-P-03-82	La Habra	CA
21263-CD-P-02-82	Los Angeles	CA
21269-CD-P-18-82	White Plains	NY
20691-CD-P-01-82	Batavia	OH
21233-CD-P-01-82	Beachwood	OH
21242-CD-P-01-82	Bolivar	OH
20692-CD-P-01-82	Cincinnati	OH
20693-CD-P-01-82	Cincinnati	OH
20690-CD-P-02-82	Dayton	OH
20694-CD-P-01-82	Hamilton	OH
21251-CD-P-01-82	Holland	OH
20690-CD-P-02-82	Miamisburg	OH
20674-CD-P-01-82	Homewood	IL
20675-CD-P-01-82	Lockport	IL
23502-CD-P-01-82	Peoria Heights	IL
20653-CD-P-01-82	Schaumburg	IL
20682-CD-P-01-82	Warren Township	IL
20688-CD-P-01-82	Hammond	IN
23197-CD-P-01-82	Topeka	KS
23503-CD-P-01-82	Wichita	KS
23172-CD-P-01-82	Baton Rouge	LA

FOOTNOTES

[1] B.W.'s applications were filed on February 11, 1982. Pursuant to Sections 22.31(b) and (d) of the Commission's rules, 47 C.F.R. §§22.31 (b) & (d), conflicting applications must be filed within sixty days of the date of the public notice listing the first of the conflicting applications as accepted for filing.

[2] *A. S. D. Answer Service, et al.*, 1 FCC Rcd 753 (1986) (*A. S. D. Settlement Order), recon. and appl. for rev. denied*, 3 FCC Rcd 4213 (1988), *aff'd sub nom. Mobilfone of Northeastern Pennsylvania, Inc. v. FCC*, Nov. 29, 1989, *petition for rehearing denied*, March 6, 1990.

[3] Under the terms of the B.W. settlement agreement, B.W. agreed to dismiss its pending low-band paging applications on the effective date of the agreement. The effective date was defined in B.W.'s agreement as "the date upon which an order of the FCC in the A.S.D. proceeding . . . becomes final and unappealable." B.W. Communications, Inc., "Terms of Settlement", at 2.

[4] 3 FCC Rcd 551 (Com. Car. Bur. 1988).

[5] In support of its position, Central cites Section 405 of the Communications Act of 1934 which states that "[n]o [petition for reconsideration] shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission." Central also cites Section 1.106(n) of the Commission's rules which provides that the Commission will stay the effectiveness of an order pending a decision on a petition for reconsideration only for good cause.

[6] Section 22.31(d) states that:

> An application otherwise mutually exclusive with one or more previously filed applications, but filed after the appropriate date prescribed in paragraph (b)(2) of this section, will be returned without prejudice and will be eligible for refiling only after final action is taken by the Commission with respect to the previously filed application (or applications).

[7] On appeal of the A.S.D. *Settlement Order*, Mobilfone of Northeastern Pennsylvania argued, *inter alia*, that it was prejudiced by the settlement agreement, because it was excluded from the negotiations and the adverse findings in the *A.S.D.* record were relevant to its appeal of a decision of the Commission upholding a staff grant of a Graphic cellular application. If the court had agreed with Mobilfone and had found that Mobilfone's rights were violated, the court could have ordered a remand or other relief.

[8] The letters were sent to the last known address of the applicants with copies to their attorneys of record.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-344

In re Applications of

BODY OF CHRIST CINCINNATI (hereafter "BCC")	File No. BPED-880816MJ
WILLIAM L. COMBS, d/b/a COMBS COMMUNICATIONS (hereafter "Combs")	File No. BPH-880816MQ
JULIA A. MOORE (hereafter "Moore")	File No. BPH-880816MX
JOHN E. MORRIS & LAWRENCE R. BAKER, d/b/a MORBAK COMMUNICATIONS (hereafter "Morbak")	File No. BPH-880816NX
WILLIAM L. CARROLL (hereafter "Carroll")	File No. BPH-880816OA
LEBANON COMMUNICATIONS LIMITED PARTNERSHIP (hereafter "Lebanon Communications")	File No. BPH-880816OF
MICHAEL A. MCMURRAY & MARILYN A. MCMURRAY, A GENERAL PARTNERSHIP, d/b/a MCMURRAY COMMUNICATIONS (Hereafter "McMurray")	File No. BPH-880816OI
THE LIVING WORD, INC. (hereafter "TLW")	File No. BPH-880816OJ
NANCY A. FENTON (hereafter "Fenton")	File No. BPH-880816NE (DISMISSED HEREIN)

For Construction Permit for
a New FM Station on Channel
247A (97.3 MHz) in
Lebanon, Ohio.

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 2, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Fenton*. Further enineering study of Fenton's application reveals that her application was inadvertantly accepted for tender because it failed to include a full scale transmitter site map satisfying the requirements of paragraphs 23 and 4(b) of Appendix D of the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985). By means of the *Report and Order*, the Commission established as a prerequisite of tenderability that commercial FM broadcast applications include transmitter maps in accordance with our *Public Notice*, Mimeo 3693, released April 5, 1985, and called for by FCC form 301, Section V-B, Item 15 (formerly Item 13). The *Public Notice*, 51 Fed. Reg. 45945 (Dec. 23, 1985), clarifies the requirements found in FCC Form 301 that applicants submit a 7.5 minute series U.S. Geological Survey topographic quadrangle map which marks the transmitter site. In order for the Commission's staff to verify the engineering parameters, the *Public Notice* specifies certain technical requirements the map must satisfy for the application to be tenderable.

3. One option the applicant has, in lieu of submitting the entire map, is to provide a full scale section of the 7.5 minute topographical map enclosing the transmitter site. This map section is entirely acceptable as long as it complies with the precise requirements of the *Public Notice*. In other words, it must be full-scale and accompanied by a reduced copy of the entire quadrangle map. Without a full-scale map section, the staff is unable to verify, with a requisite degree of confidence and reliability, the transmitter site coordinates and the ground elevation of the transmitter site. *See* paragraph 4(b) of Appendix D, *Report* and *Order*, *supra*.

4. Under the "window" processing system for commercial FM construction permit applications adopted in the *Report and Order*, *supra*, any error in or omission from key portions of an application as of the close of the pertinent filing window requires the return of that application as not substantially complete or insufficient for tender. *Id.* at paras. 23 and 31. In other words, applicants may perfect the tenderability of their applications and retain "window" status only by an amendment filed by the close of the applicable window. Fenton's only attempt to perfect her application was by an amendment filed October 20, 1988 (signed by a technical consultant which, in itself, violates 47 C.F.R. § 73.3513) correcting the coordinates for the proposed site. Accordingly, Fenton's application will be dismissed as inadvertently accepted for tender.[1]

5. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for

filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Morbak	Feburary 21, 1989, June 30, 1989; October 2, 1989; March 30, 1990
Carroll	April 21, 1989
Lebanon Communications	February 2, 1989

6. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants below have been unsuccessful. Accordingly, since no determination has been received as to whether the antennas proposed by Morbak and TLW would constitute hazards to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Morbak and TLW would constitute hazards to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That for the reasons stated in paragraphs 2-4 hereinabove, Fenton's application IS HEREBY DISMISSED AS inadvertently accepted for tender.

10. IT IS FURTHER ORDERED, That the Motion to Dismiss filed by Morbak against the Fenton application IS HEREBY GRANTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Morbak, Carroll, and Lebanon Communications ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

12. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On November 28, 1988, Morbak Communications filed a "Motion to Dismiss" Fenton's application for the reasons noted above. Accordingly, its Motion to Dismiss will be granted to the extent indicated herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FEEK'S TELECOMMUNICATIONS, INC. File No. I-T-C-90-110

Application for authority to operate as an international resale carrier.

COMTEL COMPUTER CORP. File No. I-T-C-90-112

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 26, 1990; Released: August 1, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on April 25 and 30, 1990, by Feek's Telecommunications, Inc. (Feek's) and ComTel Computer Corp. (ComTel), respectively, request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice services between the United States and various overseas points. The applications were placed on public notice on May 23, 1990. No comments were received.

2. ComTel is a common carrier which resells domestic message telephone service. Feek's is a start-up company which has filed the information required by Section 63.01 of the Commission's Rules. The applicants now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] After review of the subject applications, we find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public on a resale basis by Feek's and ComTel.

4. Accordingly, IT IS ORDERED that application File Nos. I-T-C-90-110 and I-T-C-90-112 ARE GRANTED, and:

a. Feek's is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 between the U.S. and the points listed in that tariff; and

b. ComTel is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-342

In re Applications of

LOWREY COMMUNICATIONS, L.P. (hereafter "Lowrey")	File No. BPH-881026MC
NORTH GEORGIA RADIO II, INC. (hereafter "Georgia")	File No. BPH-881026MD
RADIO CENTER DALTON, INC. (hereafter "Center")	File No. BPH-881026MK

For Construction Permit for a
New FM Station on Channel 283A (104.5 MHz)
in Dalton, Georgia

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 1, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Center.* An unsigned letter from "A Concerned Broadcaster & Citizen" urges rejection of Center's application alleging various EEO and O.S.H.A violations, and alleges that Gilbert Watts, President, Director, and 75 percent owner of Center, also owns 33 percent of Station WYVY-FM, Chatanooga, Tennessee. Center filed a Petition to Dismiss the objection. Procedurally, Center notes that Sections 1.52 and 73.3587 of the Commission's Rules mandate that petitions be signed, that the allegations are unsupported by any declaration or affidavit, and that since Center was not served with the objection in accordance with Section 309(d)(1) of the Communications Act of 1934, as amended, the objection must be returned pursuant to Section 73.3584(d) of the Rules. Further, Center contends that insofar as the objection was not signed, it must be dismissed pursuant to Section 73.3587. Substantively, Center also refutes all of the allegations contained in the letter. Thus, since the objection raises no apparent substantial and material questions of fact or issues concerning Center's basic qualifications to be a Commission licensee, no further consideration of the issues raised therein is required and the "petition" will be denied.

3. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Center has filed such statement, it is deficient. Center has not listed media which have significant circulation or viewership or are of particular interest to minorities and women. Accordingly, Center will be required to file an amended EEO program with the presiding Administrative Law Judge, within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

4. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Lowrey	April 10, 1989; May 25, 1989
Georgia	June 8, 1989
Center	June 20, 1989

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, that the unsigned "petition" against the application of Center IS DENIED.

9. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Center shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Lowrey, Georgia, and Center ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] On March 2, 1990, Knight Radio, Inc. (File No. BPH-881025MD) requested dismissal of its application. The request was voluntary and in accordance with our requirements governing such matters. Accordingly, the application was dismissed by Commission letter dated June 20, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-341

In re Applications of

ENTERTAINMENT COMMUNICATIONS, INC. (hereafter "ECI")	File No. BPH-890110MF
SUWANNEE VALLEY BROADCASTING, INC. (hereafter "Suwannee")	File No. BPH-890112MB
CAROL JEAN LAMONS (hereafter "Lamons")	File No. BPH-890112MK

For Construction Permit for a
New FM Station on Channel 293A (106.5 mHz)
in Five Points, Florida

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 1, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Suwannee*. The applicant, in its 301 application, Section III, failed to certify that it is financially qualified. Suwannee indicates that it is "in process of obtaining financial documentation" and will submit an amendment. To this point, no such amendment has been filed. Accordingly, an issue will be specified concerning this deficiency.

3. *EEO*. In response to Section VI, FCC Form 301, ECI has indicated that it will employ five or more fulltime employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity Program (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program is deficient in that it fails to identify at least one female-oriented recruitment source for Five Points. Accordingly, ECI will be required to file an amended EEO program with the Adminstrative Law Judge within 30 days of the release of this Order.

4. ECI petitioned for leave to amend its application on March 21, 1990. The accompanying amendment was filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a a subsequent Order upon the following issues:

1. To determine, with respect to Suwannee, whether the applicant is financially qualified.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That ECI shall file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

8. IT IS FURTHER ORDERED, That the petition for leave to amend filed by ECI IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

SEMO MOBILE COMMUNICATIONS, INC. d/b/a BEEPTEL — File No. 63500-89-22-RPS

Notice of Apparent Liability for Forfeiture for failure to file renewal notice with respect to Station KNKC272 in the Public Mobile Service at Jackson, Missouri

MEMORANDUM OPINION AND ORDER

Adopted: July 27, 1990; Released: August 2, 1990

By the Chief, Mobile Services Division:

1. Semo Mobile Communications, Inc. d/b/a Beeptel ("Semo") has filed an "Application for Remission of Forfeiture" of the $760.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" (" *NALF* ") issued June 2, 1989. At the same time, Semo paid the $760.00 to show its good faith in responding to the *NALF*.

I. BACKGROUND

2. On March 28, 1984, the MSD granted Semo authority to construct and operate frequency 454.250 MHz base station facilities for Station KNKC272 at Jackson, Missouri. Semo's authorization was effective through April 1, 1989. Semo failed to timely file its renewal application for the station. On May 15, 1989, Semo filed a request for Special Temporary Authority ("STA") to continue to operate Station KNKC272, pending Commission action on Semo's application for reinstatement of the expired authorization. On June 2, 1989, the MSD issued the *NALF*, finding that an apparent violation of Section 22.3(b) of the Commission's Rules had occurred for operating an unauthorized station, and imposed a forfeiture of $760.00.

II. SEMO'S CONTENTIONS

3. Semo argues that the $760.00 forfeiture is excessive and should be reduced. It acknowledges that it inadvertently failed to file a timely renewal application and that it operated its station without a valid authorization. It states that as soon as this oversight was discovered, it brought the matter to the Commission's attention and on May 9, 1989, it filed a request for waiver of Section 22.44(a)(2) to allow it to file an application for reinstatement of its license. Semo adds that when this request was denied, it filed a FCC Form 401 and its STA request.

4. Semo argues that three factors mitigate in favor of remission of the forfeiture: (1) its violation was unintentional; (2) it voluntarily disclosed the violation and took immediate remedial action; and (3) it has no prior history of rule violations. Semo also argues that payment of the $760.00 forfeiture would impose a significant economic burden on its operation. In support, Semo submits a copy of its 1988 "U.S. Income Tax Return for an S Corporation" which indicates that the company suffered a loss in excess of $10,000.00 for that year. Moreover, Semo points out that it has already spent nearly $2,000.00 in legal, engineering, and filing fees regarding new FCC Form 401 applications. Semo argues that the mitigating factors in its case are enough to warrant reduction of the forfeiture as was done in *Tri-County Telephone Co.*, 54 Rad. Reg. (P&F) 1065 (Com. Car. Bur. 1983) (" *Tri-County* ").

III. DISCUSSION

5. After reviewing the facts and Semo's contentions, we find no basis upon which to reduce the forfeiture. The fact that Semo's violation may have been unintentional does not alter the fact that unauthorized operation existed and that the violation continued over a period of time. We have previously noted that

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983).[1]

6. We also find Semo's economic hardship arguments unavailing. Semo's tax return for 1988 shows gross income of $139,400.00. In the absence of any other mitigating financial circumstances, we do not believe that Semo has demonstrated that the forfeiture of $760.00, or the fees it expends to rectify its violation, would result in financial hardship. Finally, we find that the totality of circumstances in this case distinguish it from *Tri-County*, and we, therefore, conclude that a remission of forfeiture has not been justified. Accordingly, we uphold the $760.00 forfeiture.

IV. ORDERING PARAGRAPHS

7. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Semo Mobile Communications Inc. d/b/a Beeptel FORFEIT to the United States the sum of Seven Hundred Sixty Dollars ($760.00) for the violation of Section 22.3(b) of the Commission's Rules. Since this amount has already been paid, no further action on the part of Semo is required.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Semo Mobile Communications, Inc. d/b/a/ Beeptel by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] The fact that a licensee voluntarily notifies the Commission of a potential rule violation and takes remedial action are factors which are taken into account in setting the amount of forfeiture. In this case, these factors were taken into account in setting the proposed forfeiture. With reference to Semo's claim of having no prior history of rule violations, we note that Semo also had been assessed a $3,190.00 forfeiture for an apparent violation involving Station KNKC272 at Oriole, Missouri, and that its request for remission of that forfeiture has been denied. *See Semo Mobile Communications, Inc.*, DA 1006-90 (Mob. Serv. Div., released July 30, 1990). Moreover, Semo's record was taken into account in setting the proposed forfeiture in the *NALF* herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Liability for Forfeiture of

PALMETTO RURAL TELEPHONE COOPERATIVE, INC. File No. 63500-89-03-AW

Notice of Apparent Liability for Forfeiture for operating a facility in an unauthorized manner with respect to Station WXS422 in the Public Mobile Service at Walterboro, South Carolina

MEMORANDUM OPINION AND ORDER

Adopted: July 27, 1990; Released: August 2, 1990

By the Chief, Mobile Services Division:

1. Palmetto Rural Telephone Cooperative, Inc. ("Palmetto") has filed a request seeking rescission of the $2,000.00 forfeiture imposed by the Mobile Services Division ("MSD") in a "Notice of Apparent Liability for Forfeiture" ("*NALF* ") issued January 6, 1989.

I. BACKGROUND

2. On April 1, 1981, the MSD granted Palmetto authority to construct and operate frequency 152.84 MHz base station facilities for Station WXS422 at Walterboro, South Carolina. On November 28, 1988, the Commission received FCC Form 489 from Palmetto indicating completion of construction of Station WXS422. In that application, Palmetto stated that construction of its facility was completed on or about June 1981 and that it began operation at that time. On January 6, 1989, the MSD issued the *NALF*, finding that apparent violation of Section 22.9(b) of the Commission's Rules had occurred in that Palmetto had operated the station without having filed the required notification of completion of construction, a continuing violation of the rules, and imposed a $2,000.00 forfeiture.

II. PALMETTO'S CONTENTIONS

3. Palmetto states that it constructed the station, began providing service in June 1981, and executed and sent FCC Form 403 to the Commission but that it never received a station license.[1] Palmetto argues that it misunderstood the Commission's rules and was not aware that it could not begin operation until it received a license from the Commission after filing its FCC Form 403. Palmetto emphasizes that it has not willfully failed to comply with the Commission's rules. It further argues that the $2,000.00 forfeiture "is unreasonable and unjust and only adds to the financial problems of providing urban services to a rural area."

III. DISCUSSION

4. After reviewing the facts and Palmetto's contentions, we find no basis upon which to remit the forfeiture. Palmetto has not submitted any evidence to demonstrate that it, in fact, filed its FCC Form 403 in June 1981. The Commission has no record of such filing. Moreover, we have previously noted that

> "[t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . ."

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983).

5. As for Palmetto's claim that the forfeiture will cause it financial hardship, we find that Palmetto's statement, quoted above, is, in the absence of any supporting evidence, insufficient to support a claim of hardship. *See, e.g., Bart Gonzalez d/b/a Digital Paging*, DA 90-1003 (Mob. Serv. Div., released July 30, 1990). We thus find no basis upon which to reduce the $2,000.00 forfeiture.

IV. ORDERING PARAGRAPHS

6. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80(f)(4) of the Commission's Rules, IT IS ORDERED that Palmetto Rural Telephone Cooperative, Inc. FORFEIT to the United States the sum of Two Thousand Dollars ($2,000.00) for the violation of Section 22.9(b) of the Commission's Rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of the release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P.O. Box 19209, Washington, DC 20036.

7. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended.

8. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Palmetto Rural Telephone Cooperative, Inc. Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] When construction has been completed in accordance with the station authorization, the permittee must notify the Commission. In 1981, there was a two-step procedure whereby the Commission would first issue a construction permit and then would issue the license to operate after the FCC Form 403 was filed. After 1982, the Commission issued a combined construc-

tion permit and license. After 1982, the licensee was still required to file an FCC Form 489 when construction was completed.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-137

In re Applications of

Roy E. Henderson d/b/a PUEBLO RADIO BROADCASTING SERVICE	File No. BPH-861002TA
SANCHEZ COMMUNICATIONS, INC.	File No. BPH-861002TB
HAL S. WIDSTEN	File No. BPH-861002TE
O-V COMMUNICATIONS	File No. BPH-861002TH

For Construction Permit for New
FM Station, Channel 248A,
Oro Valley, Arizona

Appearances

William D. Silva and *Shaun A. Maher*, on behalf of Pueblo Radio Broadcasting Service; *David Tillotson* and *Paul J. Feldman*, on behalf of Sanchez Communications, Inc.; *Jeffrey D. Southmayd*, on behalf of Hal S. Widsten; and *Aaron P. Shainis* and *Lee J. Peltzman*, on behalf of O-V Communications.

DECISION

Adopted: June 26, 1990; Released: July 26, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member ESBENSEN issuing Separate Statement in which Board Member BLUMENTHAL joins.

Board Chairman MARINO:

1. Pueblo Radio Broadcasting Service (Pueblo) was found to be the best comparative applicant in this proceeding because only Pueblo was awarded substantial credit (100%) for participation of ownership into management of its proposed station which outweighed a minor diversification demerit Pueblo received for its other media ownership interests. *See Initial Decision* (I.D.) of Administrative Law Judge Richard L. Sippel (ALJ), 4 FCC Rcd 7802, 7812 (1989). The proceeding is now before the Review Board on exceptions filed by each of the applicants, and reply briefs filed by Pueblo and Sanchez Communications, Inc. Oral argument was heard on April 27, 1990. For the reasons set out below, we affirm the ALJ's ultimate grant to Pueblo.

PUEBLO

2. Pueblo is a sole proprietorship owned by Roy E. Henderson, an experienced broadcaster, who proposes to divest his other mass media ownership interests, move to Oro Valley, and serve as full-time general manager of the station (if Pueblo is awarded the construction permit). I.D., paras. 6, 12-13. Pueblo was awarded 100% integration credit for Henderson's proposal to participate in management of the station. *Id.*, para. 63. However, the ALJ also found that Henderson's May 13, 1988 divestiture pledge came too late in the proceeding to be credited with respect to his ownership of two stations he acquired in 1987: Station KASK (TV), Las Cruces, New Mexico, and Station KGLF-FM, Freeport, Texas. *Id.*, para. 45. Later, in August 1988, Pueblo acquired a construction permit for an FM station at South Padre Island, Texas, but failed to *timely* report this acquisition or Henderson's intent to divest that station. *Id.*, para. 47. Thus, Pueblo was attributed with ownership of these three stations, and assessed a "slight to moderate diversification" demerit. *Id.*, para. 63.

3. In post-I.D. pleadings filed with the Board, Sanchez alleges that Pueblo had failed to report Henderson's acquisition of additional stations, principally Stations KFRD-AM/FM, Rosenberg-Richmond, Texas. Based on these station acquisitions, Sanchez seeks an increased diversification demerit or remand on a new reporting issue against Pueblo. *See* Sanchez "Petition to Re-Open the Record and to Enlarge Issues" and "Petition for Leave to Supplement Exceptions," both filed April 24, 1990. Pueblo has responded that it timely reported Henderson's acquisition of these additional stations and contemporaneously pledged to divest them should Pueblo prevail in its quest for the Oro Valley facility. *See* Pueblo Oppositions, both filed April 27, 1990. In particular, Pueblo stated that (a) on October 26, 1989, it had filed with the ALJ a petition for leave to amend to report the Commission's September 27, 1989 grant of the applications to transfer KFRD-AM/FM to Henderson, and to reaffirm his divestiture pledge originally set forth in Pueblo's formal "Integration and Diversification Statement," filed May 13, 1988; (b) the ALJ rejected the October 26 petition for lack of jurisdiction because, unbeknownst to Pueblo, he had three days earlier adopted the I.D. (which was not released until October 31), *see Order*, FCC 89M-2594, released November 3, 1989; and (c) Pueblo promptly refiled its amendment with the Review Board. *See* Pueblo "Contingent Petition for Leave to Amend," filed November 8, 1989.

4. Sanchez's Reply (filed May 8, 1990) admits that it "was mistaken as to whether [Pueblo] notified the Commission . . . in a timely manner . . . [and] that there is no basis for adding a Section 1.65 reporting issue against [Pueblo], and . . . [it] withdraws its request to add such an issue." *Id.* at 2. Nonetheless, Sanchez points to Henderson's post-I.D. activity in seeking to acquire six additional radio stations and beginning construction of a seventh, all located in his native Texas. *Id.* at 3-4. While conceding that Henderson has appropriately pledged to divest all these stations in the event of an Oro Valley grant, Sanchez nevertheless claims that these latest media acquisitions, and a recent Rule Making counterproposal by Henderson to improve some of his Texas facilities (*see* Fort Bend Broadcasting Co., Inc. "Comments and Counterproposal" in RM-7009, MM Docket No. 89-459, filed December 11, 1989, appended as Exh. A to Sanchez

Reply), provide "powerful circumstantial evidence on the sincerity of Henderson's bare pledge to divest himself of all of his Texas media interests."

5. We will not attribute Pueblo with any of the subsequently acquired mass media interests. In *Santee Cooper Broadcasting Co.*, 99 FCC 2d 781, 794- 795 (Rev. Bd. 1984), *recon. denied*, 100 FCC 2d 469 (Rev. Bd. 1985), *aff'd on pertinent point sub nom. Women's Broadcasting Coalition, Inc.*, 59 RR 2d 730, 734 (1986), *aff'd sub nom. Plantation Broadcasting Corp. v. FCC*, 812 F.2d 1443 (D.C. Cir. 1987) (table), we held that a mass media ownership interest acquired by a comparative applicant after the "B" cut-off date would not be attributed provided that applicant filed a contemporaneous pledge to divest that interest if the application is granted. Shortly thereafter, in *Jerome Thomas Lamprecht*, 99 FCC 2d 1219, 1222 (Rev. Bd. 1984), *review denied*, 3 FCC Rcd 2527 (1988), we clarified that a divestiture pledge was "sufficiently contemporaneous" following acquisition of the interest, if made within the 30 day period provided by Section 1.65 of the Rules, 47 CFR §1.65, for reporting substantial and significant changes. However, in no case to date has the Board been called upon to determine, particularly in situations involving acquisition by assignment of license or transfer of control of an existing station, whether "acquisition" refers to Commission grant of the assignment or transfer application, or to the later *consummation* of the transaction.

6. Pueblo urges that its April 27, 1990 amendment reporting the acquisition of Stations KJAS(FM), Jasper, Texas and KACO(AM), Bellville, Texas and contemporaneously pledging divestiture was timely because it closely followed (within 30 days) *consummation* of the transactions, and that the earlier dates of Commission approval (each more than 30 days prior to the filing of the amendment) are not decisionally significant because no actual "acquisition" occurred on those dates. *See* Pueblo Oppositions, filed April 27, 1990, at 5-6 & nn. 3-4. Because we have not previously resolved any ambiguity, we will regard Pueblo's divestiture pledges as timely. However, to avoid gamesmanship in the comparative process, the Board has concluded that a comparative applicant *must* make a divestiture pledge within 30 days of a Commission grant of an application to acquire additional stations, regardless of whether that application is for a construction permit for a new station or the transfer of control or assignment of license of an existing station to the applicant. In future cases, we will attribute to the applicant those stations whose transfer or assignment has been granted by the Commission, and for which no timely divestiture pledge has been made (*i.e.*, within 30 days of Commission action).

7. Again, Pueblo has reported the acquisition of, and Henderson has contemporaneously pledged to divest, his additional stations within 30 days of "consummation" of the transactions. Moreover, Pueblo had earlier, on May 13, 1988, pledged that Henderson would "divest of *all* of his broadcast licenses and applications" (emphasis added), a blanket promise which appears to extend to all subsequently acquired stations, and which put all competing applicants on notice of Pueblo's divestiture intentions. To obviate any doubt, we will condition Pueblo's grant on Henderson's divestiture of *all* of his other broadcast stations. *See Alexander S. Klein, Jr.*, 86 FCC 2d 423 (1981); *Mark L. Wodlinger*, *supra*, 3 FCC Rcd at 3142, and Separate Statement, *post*.

8. Various exceptions urge that the magnitude of Pueblo's diversification demerit for the three stations attributed to it by the I.D. should be increased. *See* Sanchez Br. at 44 (seeking "moderate" demerit); Widsten Br. at 3-5 ("substantial" demerit); O-V Br. at 4-8 (same). We agree with the ALJ that Commission precedent establishes that Pueblo's instant Oro Valley, Arizona proposal should be assessed no more than a "slight to moderate" diversification demerit for Henderson's ownership of the two Texas FM stations (each located some 800 miles from Oro Valley) and a single New Mexico TV station (about 240 miles away). *See Omaha TV, Inc.*, 102 FCC 2d 875, 882-885 (Rev. Bd. 1985)(and cases discussed therein), *review denied in pertinent part*, 4 FCC Rcd 730 (1988).

9. Widsten challenges the ALJ's award of 100% "integration" credit to Pueblo, essentially arguing that Henderson will not be able to effectuate his pledge to devote full-time managing the proposed Oro Valley station, because the demands of his other broadcast stations will preclude him from doing so. Widsten Br. at 5-6. *See also* Sanchez "Petition for Leave to Supplement Exceptions," filed April 24, 1990, at n. 3. Sanchez also urges that Henderson's recent Texas media acquisitions and proposals (*see supra* para. 4) undermine Henderson's promise to "move to Oro Valley to construct and manage a new station" (Reply at 5) (*i.e.*, affect adversely Pueblo's "integration" proposal).

10. We deny these exceptions. "[I]ntegration credit is due when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out." *Coast TV*, 5 FCC Rcd 2751, 2752 (1990)(" *Coast II* "); *Bradley, Hand & Triplett*, 87 FCC 2d 657, 662 (Rev. Bd. 1982). Henderson's direct written testimony states unequivocally that he "will terminate [his] present employment, relocate to Oro Valley and serve as general manager . . . of the new FM station on a full time basis (at least 40 hours per week)." Pueblo Exh. 1 at 1; *see also* Pueblo Exh. 2 at 3. When cross-examined, Henderson explained that he has no conflicting commitments to work at any other station he had applied for. *See* Tr. 96-101. With particular respect to his FM construction permit for South Padre Island, Texas, which permit he had recently acquired through settlement (Tr. 106), Henderson elaborated that (1) since the instant, later-filed Oro Valley application, his primary commitment has been to Oro Valley (and not South Padre Island); and (2) if the South Padre Island proceeding had proceeded to comparative hearing (rather than been terminated successfully through settlement), he would have voluntarily dismissed the South Padre Island application in order to concentrate on Oro Valley. Tr. 100-101. Moreover, Henderson has already divested two of the stations he owned and has not consummated (and has cancelled) his proposed acquisition of two additional stations. Factoring in his general divestiture pledge and our condition, he will actually own no other station if he is awarded the Oro Valley permit. In sum, the record evidence fully supports, and does not undercut, Henderson's "integration" commitment to Oro Valley. Accordingly, we affirm the ALJ's award of 100% "integration" credit to Pueblo, since there is insufficient reason at this point to question Henderson's commitment, and his ongoing broadcast transactions during the course of this proceeding are fully consistent with the Commission's recognition that principals are not expected "to remain static during often lengthy proceedings." *Coast*

TV, 4 FCC Rcd 1786 (1989)(" *Coast I* ") (*But see Separate Statement, post.*) Moreover, "there has been no allegation that [Henderson's various broadcast transactions] ha[ve] contravened any outstanding Commission rule or policy; and, thus, his 'activities' are irrelevant in the integration analysis." *Sarasota - Charlotte Broadcasting Corp.*, FCC 90R-53, released June 27, 1990, at para. 12.

SANCHEZ

11. Structured as a two-tiered corporation, Sanchez has a single "voting" stockholder, Anna M. Sanchez, who owns 25% equity in the applicant, and has one "non-voting" stockholder, B. Howard Bernstein (75% equity). I.D., paras. 7, 14-15. Although Sanchez sought 100% "integration" credit for Anna Sanchez's proposed role as full-time general manager of the station, *see id.*, paras. 35, 51, the ALJ found that the record evidence as a whole failed to provide reasonable assurance that the "non-voting" stockholder, Bernstein, would not in actuality control Sanchez, and therefore he withheld all "integration" credit from the applicant, effectively treating its proposal as a "sham". *Id.*, paras. 16-34, 51-61.

12. Sanchez excepts to the rejection of its "integration" proposal and seeks restoration of 100% credit therefor. Sanchez Br. at 5-42. It principally contends that it always intended to have a two-tier ownership structure despite the specification of only one class of stock in its original articles of incorporation, *id.* at 7-16, that Bernstein does not control the applicant, *id.* at 16-39, and that, in any event, it should at least receive 25% "integration" credit which corresponds to Anna Sanchez's equity share in the applicant. *Id.* at 40-42.

13. We deny Sanchez's exception that it is entitled to 100% integration credit. Although the Commission normally does not consider the interests of non-voting stockholders relevant in determining integration credit, it recognizes that:

> Sometimes an applicant may present a favorable formal structure on paper in order to gain a quantitative integration preference, but in reality that structure is not an accurate depiction of how the licensee's affairs will be managed. Thus, limited partners or non-voting stockholders, although nominally without influence over the applicant, may actually participate in or control the applicant's decision-making process. In those instances, the Commission disregards the applicant's formal ownership structure and treats the nominally passive owners (that is, non-voting stockholders or limited partners) as if they were active in the management of the applicant -- and thus relevant to the Commission's integration analysis. *See e.g., Signal Ministries, Inc.*, 104 FCC 2d 1481, 1494-97 ¶¶ 15-16 (Rev. Bd. 1986), *review denied* 2 FCC Rcd 1259, 1259 ¶ 2 (1987), *aff'd by judgment sub nom. Adelphi Broadcasting Corp. v. FCC*, 838 F.2d 571 (D.C. Cir. 1988); *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 9 (1985), *aff'd per curiam sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987); *Henderson Broadcasting Co.*, 63 FCC 2d 419, 424-26 ¶¶ 10-13 (Rev. Bd. 1977). *See also Cleveland Television Corp. v. FCC*, 732 F.2d 962, 969 (D.C. Cir. 1984). "[W]here there is a basis in the record for inferring that non- voting shareholders will exercise influence or control of an ongoing business," an applicant's integration proposal will be discredited. *Victory Media*, 3 FCC Rcd 2073, 2074 ¶ 18 (1988).

Coast I, supra, 4 FCC Rcd at 1787. Applying this legal framework to the facts before it, the Commission found that several post-organizational actions by the limited partners, including paying bills of the applicant, "go beyond the permissible functions of limited partners and are sufficient in themselves . . . to support the conclusion that the general partners would not be the *only* active, controlling owners." *Id.* (emphasis in original). Therefore, the Commission affirmed the Board's reduction of the applicant's "quantitative integration credit from 100 percent to at most 30.74 percent (corresponding to the amended general partners' interests . . .)." *Id.* at 1786.

14. In dismissing petitions for reconsideration of *Coast I*, the Commission "perceive[d] no basis for modifying [its] award of no more than 30.74 percent quantitative credit." *Coast II, supra*, 5 FCC Rcd at 2752. It there emphasized:

> Notwithstanding [the applicant's limited partnership] agreement, the "limited" partners thereafter engaged in activities that go beyond what is permissible for a limited partner. These activities, which included active participation in initiating the application and in arranging for its financing, continued for at least three weeks *after Coast filed its application representing that these owners would be limited partners.*
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> * * *
>
> To the extent *Victory* [*Media, Inc.*, 3 FCC Rcd 2073 (1988),] inadvertently suggested that the involvement of an allegedly passive owner in an applicant's activities after the applicant has adopted a bifurcated form of business organization is irrelevant to the question of whether that owner will exercise influence over the management of the applicant in the future, it is hereby expressly overruled. On further reflection we hold that, where a "passive" owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes.
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> * * *
>
> In summary, where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement.

Id. at 2752-2753 (emphasis in original; footnote omitted).

15. Here, it is undisputed that Sanchez's "non-voting" stockholder, B. Howard Bernstein, after making loans to the corporation of $30,000 and $50,000, retains signature authority over Sanchez's checking account. I.D., para. 21;

see Tr. of Oral Arg. at 1090-97. This participation requires attribution of his 75% ownership interest in Sanchez for integration purposes. *See Coast II*. Under the Commission's insulation requirements, passive investors may not "communicat[e] with the licensee or [its active managing owners] on matters pertaining to the day-to-day operations of its business." *Ownership Attribution*, 58 RR 2d 604, 619 (1985) (footnote omitted). Bernstein's retention of co-authority over the corporate checking account gives him access to knowledge about (and potential input to) some of the most crucial ongoing daily station activities, contrary to the Commission's insulation requirements. Moreover, during Sanchez's absence, Bernstein, a 75% owner, would have sole and actual control of the purse-strings of the proposed station. In fact, he has already written some checks after the adoption of the two-tiered corporate structure. In other words, Bernstein is "materially involved" in the management of the applicant. *See id.* at 618-620; *Coast II*, 5 FCC Rcd at 2752. Thus, Sanchez can receive no more than 25% quantitative integration credit.

WIDSTEN AND O-V

16. Both Widsten and O-V proposed no "integration" in this proceeding. I.D., paras. 40-41. Moreover, O-V received a slight diversification demerit because its general partner will remain as general manager of a television station (Channel 48) in Galveston, Texas. *Id.*, paras. 9, 49. Widsten has no attributable mass media ownership interests. *Id.*, paras. 8, 44. No exceptions challenge these findings; therefore they are final. 47 CFR §1.277(a) (objections not saved by exception are waived).

SUMMATION

17. Pueblo, with 100% quantitative credit, enjoys a substantial "integration" preference over Sanchez, which has at most 25% credit, *see Omaha TV*, *supra*, 102 FCC 2d at 882 (and cases cited therein); *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1085 (Rev. Bd. 1980) (74.9% to 25% margin warrants substantial preference), and over Widsten and O-V, which each have no credit. Qualitative enhancements cannot affect this large quantitative gap. *See, e.g., Newton Television Limited*, 5 FCC Rcd 2755, 2756 & n. 3 (1990); *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 (1989). Sanchez and Widsten, which have no attributable mass media ownership interests, have each been awarded a "slight to moderate" diversification preference over Pueblo and a slight preference over O-V. Because Pueblo's substantial integration preference outweighs the smaller diversification preferences awarded to Sanchez and Widsten, we affirm the ALJ's ultimate grant of Pueblo's application (I.D., para. 63). *See Omaha TV*, 102 FCC 2d at 885; *Old Time Religion Hour, Inc.*, 95 FCC 2d 713, 728-729 (Rev. Bd. 1983), *recon. denied*, 96 FCC 2d 551 (Rev. Bd. 1984), *review denied*, 57 RR 2d 1147 (1985); *see also Richard P. Bott, II*, 4 FCC Rcd 4924, 4930 (Rev. Bd. 1989) (substantial integration preference outweighs combined slight diversification and slight-to-moderate comparative coverage preferences), *review denied*, 5 FCC Rcd 2508 (1990); *see generally, Gilbert Broadcasting Corp.*, 91 FCC 2d 450, 469-470 (1982) (diversification advantage may be outweighed by a more significant integration advantage).

18. ACCORDINGLY, IT IS ORDERED, That the "Contingent Petitions for Leave to Amend" filed November 8, December 4, 1989, and January 19, 1990, the "Petitions for Leave to Amend" filed April 27 and June 15, 1990, and the "Motion for Leave to File Comments" filed May 16, 1990, all filed by Pueblo Radio Broadcasting Service, ARE GRANTED, and the amendments and comments ARE ACCEPTED;

19. IT IS FURTHER ORDERED, That the "Petition For Leave to Supplement Exceptions" filed April 24, 1990 by Sanchez Communications, Inc. IS GRANTED and the supplement IS ACCEPTED, and that the "Petition to Re-Open the Record and to Enlarge Issues" filed April 24, 1990 by Sanchez Communications, Inc. IS DENIED;

20. IT IS FURTHER ORDERED, That the "Petition for Leave to Amend" filed November 16, 1989 by Hal S. Widsten IS GRANTED, and the amendment IS ACCEPTED, and that the "Request for Leave Not to Participate in Oral Argument" filed March 16, 1990 by O-V Communications IS GRANTED; and,

21. IT IS FURTHER ORDERED, That the applications of Sanchez Communications, Inc. (File No. BPH-861002TB), Hal S. Widsten (File No. BPH-861002TE), and O-V Communications (File No. BPH-861002TH) ARE DENIED, and the application of Roy E. Henderson d/b/a Pueblo Radio Broadcasting Service (File No. BPH-861002TA) for a construction permit for a new FM station at Oro Valley, Arizona IS GRANTED subject to the condition that Roy E. Henderson divest himself of his interests in Stations KFRD-AM/FM, Rosenberg-Richmond, Texas; FM Translator Station K285CS, North Houston/Spring, Texas; the FM construction permits for South Padre Island (File No. BPH-850712RI) and Mason, Texas (File No. BPH-881027ML); LPTV Station KO5IL, Clear Lake, Texas; Station KACO(AM), Bellville, Texas; Station KJAS(FM), Jasper, Texas; Station KRTX(FM), Galveston, Texas; and dismiss his application for construction permit for FM Channel 236C2, Comfort, Texas.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

SEPARATE STATEMENT
OF
BOARD MEMBER ERIC T. ESBENSEN
IN WHICH
BOARD MEMBER NORMAN B. BLUMENTHAL JOINS

The principal of the prevailing applicant here, Roy E. Henderson, has promised to personally "integrate" full-time into the management of this Class A FM facility proposed to serve Oro Valley, Arizona, and to divest of his numerous other broadcast interests. It is noted that Henderson has acquired (or has been approved to acquire) no less than *seven* different broadcast facilities during the pendency of this proceeding (just since September 1989). [1]

Although Henderson has maintained his Oro Valley "integration" pledge throughout (as well as his divestiture pledges), Henderson's active sales and acquisition pattern

of late raises inevasible skepticism as to the efficacy of both of those pledges. In its recent *Proposals to Reform the Comparative Hearing Process*, FCC 90-194, released June 26, 1990, the Commission has determined to "seek comment on appropriate measures to *ensure the future adherence to promises made in applications for purposes of enhancing an applicant's comparative standing under diversity and integration criteria.* " *Id.* at para. 15 (emphasis added).

Henderson's pledges here provide a perfect example of such considerations for Commission deliberation, and Henderson himself should acquaint himself with the Commission's recent action in *WCVQ, Inc.*, FCC 90-224, released June 26, 1990, where the Commission modified the Board's recent *Order* in that proceeding, 4 FCC Rcd 4079 (Rev. Bd. 1989), and ordered a further hearing into the question of whether an applicant had fulfilled a previous "integration" pledge. Should Henderson ultimately receive this Oro Valley permit, it is devoutly hoped that all interested parties -- competitors current and potential, the local citizenry, and the Commission -- keep a keen eye upon Henderson, lest he renege in the slightest.

FOOTNOTE TO STATEMENT

[1] Various pleadings submitted on behalf of Henderson throughout this proceeding reveal, for example, the following (*see* Petitions for Leave to Amend, filed April 27, 1990, and June 15, 1990, respectively, by Roy E. Henderson):

Statement[s] Concerning Ownership Interests

Roy E. Henderson filed an Application For Consent For Assignment of License of radio station KGLF (FM), Freeport, Texas, from Roy E. Henderson (individually), the Licensee, to Bancora Broadcasting Co., Inc. (BALH-890828HL). As previously reported, this application was filed on 8/28/89 and was granted on October 27, 1989. This transaction was consummated on March 30, 1990 and Mr. Henderson no longer holds any interest in this station.

As previously reported, an Application For Consent For Assignment of License of radio stations KFRD AM and FM, Rosenberg, Texas, from Fort Bend Broadcasting, Inc., the Licensee, to Roy E. Henderson (individually) (BTC-890808EC and BTCH-890808ED), was approved on September 27, 1989 and closing occurred on December 5, 1989.

As previously reported, Roy E. Henderson d/b/a New Ulm Broadcasting Co. filed an application with the FCC on December 21, 1989 requesting the Commission's consent to an Assignment of License (FCC Form 314) of AM Station KACO, Bellville, Texas from J. Lee Dittert, Jr. and Dinah L. Dittert, his wife to Roy E. Henderson d/b/a New Ulm Broadcasting Co. (BAL-891221EC). That application was granted by Public Notice March 2, 1990 and Mr. Henderson acquired the station via a closing that occurred on April 17, 1990.

As previously reported, Roy E. Henderson filed an application with the FCC on December 19, 1989, requesting the Commission's consent to an Assignment of License (FCC Form 314) of FM Station KJAS, Jasper, Texas from Jasper County Broadcasting Comopany, Inc. to Roy E. Henderson (BALH-891219GU). That application was granted by Public Notice March 1, 1990 and Mr. Henderson acquired the station via a closing that occurred on April 18, 1990.

As previously reported, Roy E. Henderson d/b/a Sonoma Media Corporation filed an application with the FCC on December 14, 1989, requesting the Commission's consent to an Assignment of License (FCC Form 314) of FM Station KRTX, Galveston, Texas from Irvin Davis to Roy E. Henderson (BALH-891214GQ). That application was granted by Public Notice April 4, 1990 and Mr. Henderson expects to acquire the station at a closing to occur in the near future.

As previously reported, on December 1, 1989, an application was filed with the FCC requesting the Commission's consent to an Assignment of Licenses (FCC Form 314) of KVLG(AM) & KBUK(FM) LaGrange, Texas from Fayette Broadcasting Corporation to LaGrange Broadcasting Company (BALH-891214GQ). Roy E. Henderson is President and 100% stockholder of LaGrange Broadcasting Company. That application was granted by Public Notice March 21, 1990 and Mr. Henderson expects to acquire the station at a closing to occur in the near future.

Mr. Henderson reaffirms his original diversification statement filed in this proceeding, and will divest all of his media interests including those interests recently acquired: KACO, Bellville, Texas and KJAS, Jasper, Texas, should the *Order*, granting him the Construction Permit in this proceeding be affirmed by the Review Board and become final.

* * *

On March 21, 1990, the Commission granted an assignment of Radio Stations KVLG and KBUK (referred to previously by its prior call sign "KMUZ") from Licensee Fayette Broadcasting Corp. to Roy E. Henderson. No closing was reached on this transaction, the contact between the parties has expired and by mutual agreement the assignment has been withdrawn. Therefore, Fayette Broadcasting Corp. will remain the Licensee of these stations.

On May 23, 1990, Roy E. Henderson d/b/a Spanish Aural Services Company voluntarily withdrew his application for a new FM Station at Liberty, Texas.

Of course, under currently prevailing policy, Henderson is not required to retain these stations for any minimum period. *Applications for Voluntary Assignments or Transfer of Control*, 99 FCC 2d 971 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SUN COMMUNICATIONS, INC. File No. 10232-CL-P-581-A-88

For construction authority to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve Market No. 581, North Dakota 2 - Bottineau Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: July 27, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND AND CONTENTIONS

1. On June 8, 1990, the Commission issued a Public Notice, Mimeo No. 3497, announcing that the Commission would conduct lotteries on July 31, 1990, to select cellular radio applications to process in three Rural Service Areas (RSAs). In each of these markets, lotteries had been held previously, but the winning applications had been found defective under the Commission's rules and dismissed. One of the dismissed applicants, Sun Communications, Inc. (Sun), whose application is captioned above, has filed a "Second Petition For Further Reconsideration" of its dismissal. Sun has requested the Bureau to either stay the lottery in RSA Market No. 581 presently scheduled for July 31, 1990 pending action on Sun's petition for reconsideration, or to dispose of Sun's petition for reconsideration before the lottery occurs.

2. Sun argues that it would be procedurally improper for the Bureau to conduct a relottery for RSA Market No. 581 while Sun's application is still pending before the Bureau. Sun asserts that such an action would raise a question as to whether Sun would receive a full, fair, and impartial hearing from the Bureau on its petition for reconsideration. Sun contends that it is unrealistic to expect the Bureau fairly to consider reversing its prior dismissal ruling once it has taken an action which presumes that its prior ruling will be affirmed. For this reason, Sun asks the Bureau either to stay the relottery in Sun's market or to dispose of Sun's petition for reconsideration before the relottery.

II. DISCUSSION

3. Sun has failed to show that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm."); The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before the issuance of a construction permit. Even after that process is completed, it is clear that other corrective relief is available should Sun wish to challenge the grant of a construction authorization to a lottery winner by filing a petition for reconsideration or an application for review of the grant. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The courts have recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, whether or not a subsequent construction authorization is challenged, it would be conditioned on the outcome of any pending proceedings regarding the dismissal of prior lottery winners. There is, therefore, no basis for Sun's assertion that the Commission would be unable to provide it with adequate relief should it ultimately prevail on the merits.[1] Accordingly, we conclude that Sun has failed to demonstrate that it will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting the stay would harm the public in general and other interested parties because a delay of the lottery would deny expeditious service to the public in the event that Sun's appeal is unsuccessful.

4. Accordingly, IT IS ORDERED that the request for stay filed by Sun Communications, Inc. (File No. 10232-CL-P-581-A-88) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] For the same reason, we do not perceive any compelling reason for disposing of Sun's petition for reconsideration prior to the lottery.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WESTERN CALIFORNIA CELLULAR PARTNERS — File No. 10184-CL-P-709-A-88

For construction authority to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve Market No. 309, Wisconsin 2 - Bayfield Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1990; Released: July 30, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND AND CONTENTIONS

1. On June 8, 1990, the Commission issued a Public Notice, Mimeo No. 3497, announcing that the Commission would conduct lotteries on July 31, 1990, to select cellular radio applications to process in three Rural Service Areas (RSAs). In each of these markets, lotteries had been held previously, but the winning applications had been found defective under the Commission's rules and dismissed. One of the dismissed applicants, Western California Cellular Partners (Western), whose application is captioned above, has filed an application for review. Western has requested a stay of the non-wireline lottery for market no. 309 pending final action on the application for review.

2. Western argues that it has a substantial chance of prevailing on the merits of its appeal. Western also claims that it will suffer irreparable harm unless a stay is issued. Western argues that once the lottery is held, a construction permit could be issued, and a system constructed, before the Commission acts on Western's application for review. Western argues that once construction begins it will be impossible for the Commission to impartially consider the merits of Western's appeal. Western further argues that it will suffer economic harm if the lottery is held. Western states that it will have to spend money contesting the application of the new lottery winner. Finally, Western argues that the need to process the applications of both Western and the new tentative selectee may result in additional delays in awarding the non-wireline construction permit. Western states that delay in starting cellular service is contrary to the public interest.

II. DISCUSSION

3. Western has failed to show that it will suffer irreparable injury if the lottery takes place as scheduled. *See Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("It is . . . well settled that economic loss does not, in and of itself, constitute irreparable harm."). The lottery procedure neither constitutes, nor automatically results in, the grant of a construction permit. Rather, it initiates a process which will require some time before the issuance of a construction permit. Even after that process is completed, it is clear that other corrective relief is available should Western wish to challenge the grant of a construction authorization to a lottery winner by filing a petition for reconsideration or an application for review of the grant. *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). The courts have recognized that license grants which are challenged by litigation are subject to that litigation and may be undone if the basis of the grant is reversed as a result of the outcome of the litigation. *See, e.g., Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 736 (D.C. Cir. 1976). Moreover, whether or not a subsequent construction authorization is challenged, it would be conditioned on the outcome of any pending proceedings regarding the dismissal of prior lottery winners. There is, therefore, no basis for Western's assertion that the Commission would be unable to provide it with adequate relief should it ultimately prevail on the merits. Accordingly, we conclude that the Western has failed to demonstrate that it will suffer irreparable harm, as is required for the grant of a stay. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). We further note that granting the stay would harm the public in general and other interested parties because a delay of the lottery would deny expeditious service to the public in the event that Western's appeal is unsuccessful.

4. Accordingly, IT IS ORDERED that the request for stay filed by Western California Cellular Partners (File No. 10184-CL-P-309-A-88) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	
PRO-MAX COMMUNICATIONS	File No. 10612-CL-P-312-A-89
ACME PARTNERSHIP	File No. 10700-CL-P-371-A-89
FIRST-CELL	File No. 10707-CL-P-378-A-89
NANCY M. WILSON	File No. 10302-CL-P-394-A-88
MAX-CELL COMMUNICATIONS	File No. 10082-CL-P-610-A-88
K.O. COMMUNICATIONS	File No. 10406-CL-P-658-A-89
CELL-PHONE COMMUNICATION NETWORK	File No. 10408-CL-P-660-A-89
For a construction permit to establish a new cellular system to operate on frequency Block A in the Domestic Public Radio Telecommunications Service	

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1990; Released: July 23, 1990

By the Commission:

1. On June 8, 1990, the Common Carrier Bureau granted construction authorizations to the captioned applicants.[1] It has now come to our attention that the applicants provided a firm financial commitment letter from a possibly fraudulent entity which at all times may have lacked the funds necessary to back up its commitments to the applicants. The lender for these applicants, Columbia Security and Transfer, Inc. (Columbia), may not be a recognized financial institution as required by Section 22.917(c)(5) of the Rules, and may in fact have been in the business of defrauding United States companies and financial institutions by issuing over $125 million in certificates of deposit which were totally fraudulent and worthless because no money was ever deposited with Columbia to cover them.[2]

2. In light of these matters, we have decided, pursuant to Section 1.117 of the Rules, to set aside the grants of the authorizations to the captioned applicants. This action will give us the opportunity to determine what further action, if any, is required.

ORDERING PARAGRAPHS

3. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 1.117 of the Rules, the grants of authorizations to the captioned applicants ARE HEREBY SET ASIDE, the applications are returned to pending status, and all dismissed mutually exclusive applications to the captioned applications are returned to pending status.

4. IT IS FURTHER ORDERED that these applications are HEREBY REMANDED to the Common Carrier Bureau for further proceedings.

5. IT IS FURTHER ORDERED that this order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* Public Notice, Report No. CL-90-209 (June 8, 1990).

[2] *See* Her Majesty the Queen v. Mirando, File No. DC 411/89 (Dist. Ct. Ontario, Canada, Feb. 28, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-124

In the Matter of

Access to Telecommunications
Equipment and Services
by the Hearing Impaired
and Other Disabled Persons

ORDER

Adopted: July 31, 1990; Released: August 1, 1990

By the Chief, Domestic Facilities Division:

Before the Common Carrier Bureau is a Motion for Extension of Time, filed by the North American Telecommunications Association (NATA) for extension of the comment period in the above captioned proceeding until August 31, 1990. NATA claims that it needs to gather information as to expected costs incurred by manufacturers, distributors and users in order to comply with the proposed hearing aid compatibility requirement. It also claims that preparation of comments is a complex task. NATA certifies that copies of its motion were served on all parties of record, and no oppositions were received. It is the Commission's policy not to grant extensions routinely. However, we believe that the extension sought by NATA is justified in this technically complex proceeding. Accordingly, an extension of time for the filing of comments is granted until **August 27, 1990.** Reply comments will be due on **September 24, 1990.** No further extensions of time are anticipated.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Centel Network Communications, Inc.
Revisions to Tariff F.C.C. No. 1

Transmittal No. 22

ORDER

Adopted: July 31, 1990; Released: July 31, 1990

By the Chief, Common Carrier Bureau:

1. By Transmittal No. 22, Centel Network Communications, Inc. (Centel Net) discontinues service to a number of the exchanges it presently serves. MCI Communications Corporation (MCI) filed a petition to suspend and investigate Transmittal No. 22 and Centel Net replied. The transmittal is scheduled to become effective on August 1, 1990.

2. Centel Net is a non-dominant resale carrier which provides switched voice interexchange service to customers in five states. Centel Net is the interexchange operation of the Central Telephone Company, a local exchange carrier. On June 22, 1990, it filed an application with the Commission for authority to discontinue the provision of service.[1] In addition, as required by Section 63.71 of the rules, 47 C.F.R. § 63.71, Centel Net notified its customers in the affected areas by letter dated June 22, 1990 (June 22 letter) that service would be discontinued to them as of July 23, 1990.[2]

3. MCI argues that Centel Net is unreasonably discriminating among carriers in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because it states in its June 22 letter that it will pay the interexchange carrier change charge only if customers switch to US Sprint. MCI asserts that this is also an unreasonable practice in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). Further, MCI contends that the June 22 letter misleads customers to believe that the selection of US Sprint is condoned by the Commission. MCI Petition at 4-5. In addition, MCI contends that Centel Net must make a proper accounting of the costs it will incur for discontinuing service and requests that the Commission direct Centel Net to report in the public record all such costs. *Id.* 5-6.

4. Centel Net asserts that MCI misconstrues its June 22 letter. According to Centel Net, its letter clearly states that customers can choose a carrier other than US Sprint and provides information on how a customer can obtain information about alternative carriers. In either event, Centel Net maintains that it will pay the carrier change charges. Centel Net claims that the reason it mentions US Sprint in its letter is because US Sprint currently is the carrier whose underlying service Centel Net resells and therefore would be able to provide Centel Net's customers with the same type and quality of service. Centel Net Reply at 3-4. Centel Net also states that its proposed discontinuance of service and arrangement with US Sprint comports with the Commission's *Fourth Report and Order* in the Competitive Carrier proceeding.[3] Furthermore, according to Centel Net, it is not subject to the Commission's policies regarding allocation of default traffic because it is a non-dominant carrier. *Id.* at 6 n.7.[4]

5. Finally, Centel Net asserts that MCI's request regarding the allocation of its costs should be denied. According to Centel Net, it and the Central Telephone Company maintain separate books of account. Further, Central Telephone Company has a cost allocation manual to which it adheres and its cost allocation practices and procedures are audited annually. As MCI has not demonstrated that the Central Telephone Company or Centel Net has improperly allocated costs, Centel Net maintains that there is no justification for granting MCI's request. *Id.* at 7.

6. The Common Carrier Bureau has reviewed the tariff revisions and the pleadings. We conclude that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petition to suspend and investigate Centel Network Communications, Inc. Tariff F.C.C. No. 1, Transmittal No. 22, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Section 63.71 Application of Centel Network Communications, Inc., File No. I-T-D-90-007.

[2] Centel Net deferred the effective date of the tariff until August 1, 1990.

[3] *Citing*, Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Fourth Report and Order, 95 FCC 2d 554, 575-579 (1983) (the removal of entry and exit requirements was extended to resale carriers affiliated with exchange carriers).

[4] *Citing*, Investigation of Access and Divestiture Related Tariffs, 50 Fed. Reg. 38200 (Sept. 20, 1985) (*Allocation Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 1 — Transmittal No. 2423

ORDER

Adopted: July 26, 1990; Released: July 30, 1990

By the Chief, Common Carrier Bureau:

1. On July 13, 1990, American Telephone and Telegraph Company (AT&T) filed Transmittal No. 2423 to increase the rates for its Software Defined Network (SDN) service by approximately 2 percent at all times of day and in all mileage bands. AT&T maintains that its rate increases are below-cap and within-band, in compliance with the Commission's Price Cap Rules, 47 C.F.R. §§ 61.41 through 61.49. AT&T Transmittal No. 2423, Description and Justification at 1. AT&T's proposed rates are scheduled to go into effect on July 27, 1990.

2. ComTel Computer Company (ComTel) filed a petition to suspend or investigate Transmittal 2423 on July 20, 1990. According to ComTel, it leases transmission facilities from AT&T to resell AT&T's SDN services to hospitals and hotels. ComTel Petition at 2. ComTel asserts that it cannot resell the services of other interexchange carriers (ICs) without incurring costs or service disruptions, and claims that it is both a captive customer of AT&T and a competitor with AT&T in the SDN market. *Id.* ComTel admits that AT&T's proposed rates are within-band for price cap purposes. *Id.* at 3. However, ComTel maintains that Transmittal 2423 does not merit streamlined review, and that AT&T should be required to submit more information, because AT&T has filed "several rate increases in succession for a particular service, . . . [or] discriminatorily high rate increases for certain services . . . ." *Id.*, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 4 FCC Rcd 2783, 3099 (*Price Cap Order*). ComTel claims that AT&T reduced its daytime SDN rates for most mileage bands in March 1990, while increasing its evening rates 26 percent and its night rates 46 percent. ComTel alleges this is discriminatory because most of its customers use its service during the evening and night hours. *Id.* at 4-5.

3. ComTel further contends that AT&T's rate increases are suspect in light of the recent access charge reductions of local exchange carriers (LECs),[1] and that Transmittal 2423 is inconsistent with the Commission's resale policies. *Id.* at 5-8. Finally, ComTel claims that it would be "irreparably" harmed by AT&T's revisions because they would increase its costs $50,000 per year. *Id.* at 8-9.

4. In its reply, filed July 23, 1990, AT&T states that its rate increases citing *Price Cap Order*, 4 FCC Rcd at 3095. AT&T denies that there has been a succession of SDN rate increases, claiming that the rate revision cited by ComTel was an overall SDN revenue reduction. *Id.* at 3-4. AT&T claims it increased SDN rates in the shorter mileage bands for all times of day, and that it decreased night and evening SDN rates in the longer mileage bands. *Id.* at 4. AT&T further asserts that it reflected all the effects of LEC access rate reductions in its Transmittal No. 2396, filed June 28, 1990, and that ComTel's cost increase of $50,000 per year is not irreparable harm. *Id.* at 5-6.

5. The Common Carrier Bureau has reviewed AT&T's transmittal, its cost support material, the petitioner's pleadings, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff warrants an investigation at this time.

6. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Tarif F.C.C. No. 1, Transmittal No. 2423, filed by ComTel Computer Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, DA 90-845, released June 21, 1990 (Com.Car.Bur.).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Midyear 1986 Access Tariff Filings

Ameritech Operating Companies

BellSouth Telephone Companies

Pacific Bell

ORDER

Adopted: July 26, 1990; Released: July 30, 1990

By the Chief, Common Carrier Bureau:

1. The above-captioned local exchange carriers (LECs) filed petitions for waiver[1] of that portion of the Commission's *December 19 Order*,[2] directing LECs to provide originating WATS access lines (WALs) with Feature Group A (FGA) and Feature Group B (FGB) services. A number of carriers previously were granted waivers of this requirement. [3] These waivers are scheduled to expire on August 1, 1990. The pending waiver petitions are unopposed.

2. In general, the LECs state that in order to provide WALs with FGA and FGB they would need to modify their billing systems. They assert that there is no demand for the service and that it would be unreasonable to incur the cost and divert resources necessary to offer a service that no interexchange carrier will order.

3. The pending waiver requests are similar to those filed by the LECs in the previous three years. As there continues to be no demand for the service at issue and the costs of providing the service are not insignificant, we conclude that a further one-year extension of the requests is warranted under the present circumstances.

4. Accordingly, IT IS ORDERED that the petitions for waiver filed by Ameritech Operating Companies, BellSouth Telephone Companies, and Pacific Bell, ARE GRANTED.

5. IT IS FURTHER ORDERED that the waivers granted by this Order SHALL EXPIRE on August 1, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Petition for Continuation of Waiver, filed by Ameritech Operating Companies, July 13, 1990; Petition for Waiver, filed by the BellSouth Telephone Companies, June 18, 1990; Petition for Extension of Waiver, filed by Pacific Bell, June 22, 1990.

[2] Midyear 1986 Access Tariff Filings, 1 FCC Rcd 1247 (1986) (*December 19 Order*).

[3] *See* Ameritech Operating Companies *et al.*, Tariff F.C.C. No. 2, Petitions for Indefinite Waiver, 2 FCC Rcd 4544 (Com.Car.Bur. 1987) (waiver granted to the Ameritech Operating Companies, Pacific Bell, the BellSouth Telephone Companies, and GTE Telephone Operating Companies); Centel Telephone Companies *et al.*, Tariff F.C.C. No. 1, 2 FCC Rcd 5257 (Com.Car.Bur. 1987) (waiver granted to Centel and the Bell Atlantic Telephone Companies).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 12 — Transmittal Nos. 2367 and 2379

ORDER

Adopted: July 26, 1990; Released: July 27, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittals 2367 and 2379 to introduce Virtual Telecommunications Network Service (VTNS) Options 53 and 54 by which AT&T will provide voice and data communications service among stations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for these options are stabilized throughout a three-year term. Transmittal 2367 Description and Justification (D&J) at 1-4; Transmittal 2379 D&J at 1-4.

2. The basic charge for VTNS Option 53 is $299,100 per month. Transmittal 2367 D&J at 5. The basic charge for VTNS Option 54 is $205,700 per month. Transmittal 2379 D&J at 5. Transmittal 2367 is scheduled to become effective July 29, 1990, while Transmittal 2379 is scheduled to become effective August 5, 1990.

3. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject, or alternatively, to suspend and investigate Transmittal 2367 on June 29, 1990 (Option 53 Petition), and Transmittal 2379 on July 6, 1990 (Option 54 Petition). AT&T filed replies on July 10, 1990 (Option 53 Reply) and July 12, 1990 (Option 54 Reply), respectively.

4. Sprint argues that AT&T has failed to demonstrate that Options 53 and 54 are integrated service packages that are "unlike" AT&T's other component services. Option 53 Petition at 1-2; Option 54 Petition at 1-2. Moreover, Sprint contends that AT&T's proposal of 54 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittals also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to end its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1 billion and likely accounts for more than 2 percent of the entire interexchange market. Option 53 Petition at 2-4; Option 54 Petition at 2-4. Sprint also alleges that AT&T's cost support for Options 53 and 54 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). Option 53 Petition at 4 & 5 n.4; Option 54 Petition at 4 & 5. n.4.[1]

5. AT&T contends that the rates in Options 53 and 54 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. Option 53 Reply at 2-3; Option 54 Reply at 2-3. AT&T also states that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these methods satisfy the requirements of Section 61.38 of the Commission's Rules. Option 53 Reply at 5-7 & 6 n.* * *; Option 54 Reply at 5-7 & 6 n.* * *.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2367 and 2379, Sprint's petitions, and related pleadings. We conclude that no compelling argument has been presented that these tariffs are so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2367 and 2379, filed by US Sprint Communications Company Limited Partnership, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Sprint maintains that the arguments raised against those transmittals continue to be valid because the Bureau has not addressed these arguments on the merits in any previous Order. Option 53 Petition at 5; Option 54 Petition at 5.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Local Exchange Carriers' Individual
Case Basis DS3 Service Offerings

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: July 23, 1990; Released: August 6, 1990

By the Commission:

I. INTRODUCTION

1. On December 18, 1989, this Commission released an Order[1] finding individual case basis (ICB) rates for DS3[2] and "DS3-equivalent" services unreasonably discriminatory and therefore unlawful under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). Accordingly, the *ICB Order* directed local exchange carriers (LECs) to remove most ICB rates for DS3 and DS3-equivalent services, with limited exceptions, from their tariffs and to file general rates for DS3 and DS3-equivalent services. [3]

2. In concluding our investigation, this Commission found ICB rates for Special Access DS3 and DS3-equivalent services of BOCs, GTOC, and other LECs are not justified because the LECs failed to demonstrate that the ICB rates that they filed for DS3 services are not discriminatory and therefore lawful. This Commission directed the LECs, with limited exceptions, to convert most existing ICB rates (including rates the LECs sought to exempt) for DS3 and DS3-equivalent service to non-discriminatory, generally available rates. Additionally, in order to recognize the fact that some ICB customers have made substantial "up front" payments, the Commission directed the LECs to tariff a credit mechanism that will reflect such payments, so that customers in this position will be protected against being overcharged once they are converted to general rates. Finally, this Commission stated that LECs would not be permitted to assess against their DS3 ICB customers termination liability charges or non-recurring charges upon conversion to general rates.

3. Local Area Telecommunications, Inc. (Locate), Metropolitan Fiber Systems, Inc. (MFS), Southwestern Bell Telephone Company (SWB), Star Tel Transmission Co., Inc., and Williams Telecommunications Group, Inc. (WTG) filed petitions for reconsideration or for partial reconsideration and clarification of the *ICB Order*. Numerous parties filed oppositions to the petitions, to which petitioners replied. A listing of the parties who filed pleadings relating to reconsideration of the *ICB Order* is attached hereto as Appendix A.

4. In this Order we resolve the issues properly raised by those petitions. In resolving these issues, we deny petitions for reconsideration of SWB and WTG. In addition, we grant the petitions for partial reconsideration of MFS and Locate to the extent that we conclude that "dry fiber" services, also described as "dark fiber," provided by certain carriers must be offered at an averaged general tariff rate since it is now evident that these carriers have sufficient experience in the provision of dark fiber service to develop averaged rates. Finally, we clarify the intent of the Order with respect to the conversion of ICB customers to general rates, the application of termination liability charges by the LECs, and the use of credit mechanisms to determine credit due to customers who paid substantial "buy down" fees to reduce their recurring charges for DS3 service.

II. LIKE SERVICE DISCRIMINATION IN SWB ICB RATES

5. SWB asks us to vacate the conclusion that SWB's DS3 ICB rates are discriminatory. SWB claims its ratemaking practices were not unlawful because SWB has charged the same rates for DS3 services provided in similar circumstances based on an averaged rate matrix. SWB Petition at 2. SWB asserts that the development of its general DS3 rates is consistent with the method SWB used to develop its ICB rates, and that these procedures are consistent with the Communications Act and are lawful. *Id.* at 3-4. SWB says that more than 95 percent of its ICB rates are based on its rate matrix and are therefore non-discriminatory and lawful. *Id.* at 6.

6. SWB also contends that DS3 services are not like services. SWB argues that customers do not perceive DS3 services obtained at different times and under different terms at different rates to be like services. *Id.* at 9. SWB asserts that technically identical services purchased at different times under different terms are not like. *Id.* at 12. SWB posits that termination of ICB arrangements will prejudice SWB and its customers by fixing rates without regard for future cost and demand estimates. *Id.* at 8. SWB claims that other carriers offer technically identical services with different commitment periods at different rates. *Id.* at 9 (citing AT&T Tariff F.C.C. No. 9, Transmittal No. 503, filed Nov. 19, 1985). Therefore, asserts SWB, Commission precedent mandates that SWB be allowed to provide DS3 service on an ICB basis. Star Tel supports SWB's position that existing ICB arrangements should be exempt from the requirement for general rates, noting that it depends on its ICB arrangement with SWB to remain solvent. Star Tel Petition at 1-3.

7. Oppositions to SWB's petition note that the SWB petition generally reiterates arguments it has previously made that were rejected by the Commission. ALTS Opposition at 1-2; MFS Opposition at 1-3 MFS argues that SWB's development of a standard rate matrix for DS3 services underscores the appropriateness of the requirement that DS3 rates be offered at general tariffed rates and supports the conclusion that ICB rates are unreasonable. MFS Opposition at 4-6. CTI asserts that LECs were obligated by the Commission's 1984 *ECA Order* [4] to develop and implement general rates for DS3 service and that SWB failed to comply with this Order since it had developed a rate matrix but did not tariff general rates based on the matrix when it had the ability to do so. CTI Opposition at 3-6. ALTS claims that SWB's rate matrix is not equal to an averaged rate schedule and states that

conversion to general rates will not prevent SWB from offering long-term DS3 arrangements or from implementing periodic rate changes. ALTS Opposition at 3-5.

8. We do not find any merit in SWB's claim that the services it provided are not "like" each other for purposes of Section 202(a) of the Act. There is no credible basis for finding that customers do not perceive some DS3s to be like other DS3s. Differences in terms do not make services unlike. The mere fact that customers ordered facilities at different times in the past cannot justify different charges for contemporaneous service that those customers will be receiving in the future. Therefore, we reaffirm the conclusion that each of SWB's DS3 offerings are like services with respect to each other.

9. SWB's acknowledgment that it departed from its own matrix in 5 percent of the SWB ICBs would be a sufficient reason for reaffirming the conclusion that SWB has engaged in unreasonable discrimination in setting rates for like services even if we accepted the contention that matrix pricing could avoid discrimination. Moreover, we are not persuaded that any alternative to a general offering could remedy the discrimination that has occurred. Therefore, we deny SWB's petition insofar as SWB seeks an exemption from the requirement that it provide all DS3s through a general tariffed offering.

III. RATE LEVELS

10. The WTG petition asks us to require that the general DS3 rates must be subject to the 8 to 1 crossover ratio established in the *Strategic Pricing Order*.[5] WTG says that such a requirement is necessary to prevent "rate shock" because the general rates carriers have selected to replace ICB rates are generally higher than the ICB rates.

11. Several parties challenge WTG's assertion that the *Strategic Pricing Order* crossover ratio should be applied to DS3 pricing. They argue that the issue of crossover application is outside the scope of this proceeding and that the *Strategic Pricing Order* only pertains to the relationship between voice grade and DS1 service. Ameritech Opposition at 14; US West Opposition at 7; Ad Hoc Opposition at 6-9; SWB Opposition at 12; BellSouth Opposition at 6.

12. Rate level questions were not designated for investigation in this docket and the record accordingly provides no basis for determining that particular rates for DS3 services, or a particular formula for computing general DS3 rates, will or will not be reasonable. WTG's request is denied because WTG is seeking a remedy that is beyond the scope of this proceeding.

IV. OPTICAL SERVICE INTERFACES

13. WTG argues that optical interfaces[6] should be available on demand at general rates or, in the alternative, that current ICB rates which include optical interfaces should be allowed to continue. *Id.* at 4.

14. SWB maintains that the arrangement it tariffs as an electrical or optical interface at a bit rate is equivalent to dark fiber services. Nonetheless, SWB contends, these services are priced based on its price matrices which are equivalent to averaged rates. SWB Opposition at 4-7. Ameritech asserts that the issue of optical interfaces available on demand is not raised in the proceeding and therefore outside the scope of reconsideration. Ameritech Opposition at 14. Ameritech further asserts that no industry standard exists for optical interfaces which might support WTG's request that optical interfaces be offered on demand. *Id.*

15. WTG contends that LECs should be required to make optical interfaces available on demand or, alternatively, that such arrangements currently offered on an ICB basis should be allowed to continue. WTG argues that this issue is properly within the scope of the investigation of ICB pricing. WTG Reply at 3. WTG asserts that all BOCs, with the exception of BellSouth,[7] currently offer optical interfaces at ICB or tariffed rates, thereby rebutting any claim that industry standards do not exist for such arrangements. *Id.* at 4. In addition, WTG reiterates its arguments that LECs may be engaging in strategic pricing and that a crossover ratio should be applied to DS3 services. *Id.* at 4-5.

16. We reject WTG's argument that optical interfaces should be available on demand or at continued ICB rates. The issue of optical service interfaces described in the WTG petition was not designated as an issue in this docket and the *ICB Order* did not address the issue. Therefore, we deny WTG's request that this Commission require in this proceeding that optical interface service must be offered on demand or, in the alternative, at continued ICB rates.

V. TERMINATION LIABILITY CHARGES

17. MFS and Locate generally argue that termination liability charges should be barred regardless of the date on which DS3 service is terminated or whether a LEC ICB customer chooses to retain LEC DS3 service or elects to order DS3 service from an alternate access provider. MFS Petition at 17-21; Locate Petition at 20-23. Specifically, MFS and Locate maintain that, as a matter of law, LECs cannot enforce termination liability charges since those charges are explicit terms of rates which the Commission has found unlawful. MFS Petition at 19; Locate Petition at 21 (citing *MCI Communications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980)).

18. SWB claims that termination liability charges should be permitted because SWB will lose some $20 million in annual revenues and will be left with stranded non-reusable investment if current ICB customers do not convert to its general DS3 offering. SWB Petition at 15-16. SWB asserts that if it is not allowed to recover its costs for stranded facilities by way of termination liability charges, the loss will be detrimental to SWB's remaining special access customers. *Id.* SWB notes that early termination of ICB customers will affect 194 separate ICBs. *Id.*

19. The petitions appear to be based upon a misinterpretation of the *ICB Order* insofar as petitioners ask us to modify that Order to preclude the assessment of termination liabilities under existing ICBs after the one year transition period. The *ICB Order* already does that. That Order directed the LECs to "file tariff revisions . . . to amend the terms of all . . . ICB contracts for all DS3 and DS3-equivalent service to *terminate* one year from the effective date of the tariff revisions." *ICB Order*, 4 FCC Rcd at 8644 (emphasis added). The meaning of this language is unambiguous; it requires the *LECs to terminate* the ICB contracts. Because it is the LECs terminating the ICBs, albeit at the direction of this Commission, and not the customer, the LECs cannot impose termination liability charges on customers who elect to discontinue LEC-

provided DS3 service *after* the ICB expires at the end of the one-year transition period. At that point the ICBs will cease to be effective in their entirety, including termination liability provisions, and customers will be free to choose to discontinue DS3 service altogether, elect to take DS3 service from an alternative provider, or from the LEC under its general DS3 rates.

20. The *ICB Order* does not preclude LECs from assessing termination charges under existing ICBs if a customer chooses to terminate the service during the transition year. Petitioners have not presented any persuasive reason to include such a prohibition in the *ICB Order*. The assertion that the *ICB Order* declared all provisions of existing ICBs totally void for all purposes is inconsistent with the decision to require termination of the existing ICBs in one year. Therefore, the petitions are denied insofar as petitioners ask us to preclude the assessment of termination charges during the transition year.

21. Additionally, we find unpersuasive SWB's claim that it will lose approximately $20 million in revenues if it is not allowed to assess termination liability charges. SWB provides no support for its claim that stranded plant would exist and DS3 facilities would be non-reusable in the event SWB's DS3 customers discontinue service.

VI. CREDIT ALLOWANCES FOR " UP - FRONT " PAYMENTS

22. Locate and MFS argue that this Commission should modify the requirement that LECs tariff a credit mechanism for upfront payments to state that LECs must offer either a cash refund of up-front payments or a credit that, at the customer's discretion, could be applied to non-DS3 services. Petitioners claim this would prevent LECs from attempting to bind their ICB customers to long-term general tariff DS3 agreements. Customers would thus be free to choose alternate DS3 providers. Locate Petition at 23-24; MFS Petition at 15-16.

23. Pacific maintains that credits for up-front payments must be applied to the service for which the payment was made in order to prevent contravention of the Commission's policy against cross-subsidization between rate categories.[8] Pacific Opposition at 9 (citing MCI Telecommunications Corporation v. Pacific Northwest Bell, *et al.*, FCC 89-344, Memorandum Opinion and Order, 5 FCC Rcd 216, 223 at para. 57 (1990)). Pacific claims that applying credits to non-DS3 services would subsidize conversion of customers to competitive DS3 providers at the expense of interstate ratepayers. *Id.* The MFS reply posits that Pacific fails to support its claim that payment of up-front credits would subsidize conversion to alternate DS3 providers, and therefore the discrimination that results from refusing that class of customers credit for up-front payments is not justified. MFS Reply at 9.

24. Pacific's objection to the Locate-MFS proposal is not persuasive. The credit mechanism described in the *ICB Order* is essentially a repayment of amounts some customers may have paid for a benefit they will not be receiving because we ordered the LECs to terminate an ICB before the expected expiration date. In these circumstances, applying a credit to any LEC service would not produce cross-subsidization and would be more consistent with the purpose of the credit mechanism. To the extent that a customer is entitled to a credit as a result of up-front payments made to a LEC, we conclude that mechanisms must be established which facilitate receipt of the credit as part of the transition to generally applicable DS3 rates. The restrictions sought by the LECs would unreasonably and unfairly encumber the customer's efforts to obtain credits to which it is entitled. Therefore, we clarify the *ICB Order* in that all LECs shall offer customers the option of having any credit for up-front payments applied to DS3 or non-DS3 services. This will ensure that LECs are not attempting to impede competition for DS3 services, and that customers are protected from paying for service not rendered.

25. We reject Pacific's contention that credits must be applied exclusively to DS3 service in order to prevent cross-subsidization between rate categories. We conclude that the application of credit, to which customers are entitled for services not rendered, to a service of the customers' choice does not constitute cross-subsidization. In the *MCI* case cited by Pacific, this Commission rejected the argument that a carrier has a right to charge customers excessive rates in one category of service as long as those earnings are balanced by a deficiency in earnings in another category, and noted the Commission's duty to protect ratepayers from such cross-subsidization. MCI Telecommunications Corp. v. Pacific Northwest Bell, *et al.*, FCC 89-344, 5 FCC Rcd 216, 223 (1990). We conclude that the policies underlying our *MCI* decision are in no way compromised by our decision here to permit customers to select services to which their credits will be applied.

VII. " DRY " OR " DARK " FIBER PRICING

26. Some petitioners ask us to reconsider our decision to refrain from requiring carriers to replace dark fiber ICBs with general tariffs. Locate and MFS argue that the record does not support a finding that the LECs lack experience in the provision of dark fiber service such that they cannot compute averaged rates for the service. Locate Petition at 14; MFS Petition at 12. The petitioners allege that SWB admits that dark fiber is a substitute for DS3 service, and contend that as such the Commission should require LECs to provide the service on a general tariffed basis so that LECs will not use the service to circumvent the *ICB Order* and behave anti-competitively. Locate Petition at 15; MFS Petition at 4.

27. Pacific asserts that the experience of one LEC in the provision of dark fiber service is not sufficient to alter the Commission's finding that overall the LECs lack the experience necessary to develop general rates for dark fiber service. Pacific Opposition at 2. Pacific claims it has provided dark fiber service only four times and has no plans for additional dark fiber offerings. *Id.* at 3. Pacific maintains that no evidence has been presented to indicate that dark fiber is a DS3-equivalent service.

28. BellSouth asserts that the pleadings filed pursuant to the DS3 investigation provided the Commission with a sufficient record to conclude that dark fiber has limited applicability and the LECs lack experience in providing dark fiber service. BellSouth notes that as of 1988 it had only provided eight dark fiber arrangements. *Id.* at 3. BellSouth claims that dark fiber is distinguishable from DS3 service because there are no uniform technical standards for dark fiber. *Id.* The markets for DS3 and dark fiber service, BellSouth submits, are not the same, as MFS and Locate contend. *Id.* at 4.

29. US West and SWB maintain that the question of whether dark fiber should be offered on an average tariffed basis is beyond the scope of the *ICB Order*. US West Opposition at 2-3; SWB Opposition at 2-3. US West contends that even if dark fiber is a DS3-equivalent service, general rates for the service would not be justified because of the LECs' limited experience in providing the service. US West Opposition at 3. US West notes that, as of 1989, US West had fewer than 15 dark fiber ICBs. *Id.* at 3 n.8.

30. Locate observes that US West currently has 14 dark fiber customers in comparison with US West's contentions earlier in the DS3 investigation proceedings that it had only four dark fiber ICBs prior to the initiation of the investigation. Locate Reply at 3 (citing US West Direct Case at 5 n.10, filed Nov. 1, 1988). Evidence of such rapid expansion in the provision of dark fiber service, concludes Locate, suggests that US West's dark fiber offerings will continue to expand. Locate and MFS assert that other LECs are also accelerating the provision of dark fiber services. Locate Reply at 4; MFS Reply at 4. MFS claims that at least 100 dark fiber arrangements have been filed with the Commission, contending that such volume illustrates that LECs have adequate experience with cost and demand for dark fiber to develop averaged rates. MFS Reply at 4. MFS posits that in light of the LECs' position that the Commission lacks jurisdiction over dark fiber, the LECs may be providing some dark fiber service off-tariff. *Id.* at 5 n.12.

31. Carriers must overcome a substantial burden in attempting to demonstrate any justification for individual case rates. As we noted in the *ICB Order*, the Communications Act is usually interpreted to require generally available offerings as a means of ensuring against unreasonable discrimination.[9] ICB rates were intended to be a limited exception, both in scope and duration, to this general requirement. Accordingly, in the *ICB Order*, this Commission declared that "once exchange carriers have sufficient experience with a service . . . to permit the development of averaged rates, they must file such rates." *ICB Order*, 4 FCC Rcd at 8642. Our decision to permit LECs to continue to offer dark fiber at ICB rates was premised on our finding that the provision of dark fiber service is very new and has limited applicability, and that the LECs therefore lack sufficient experience to develop averaged rates. This finding is no longer sustainable with respect to several carriers. In particular, new information demonstrates that Bell Atlantic, BellSouth, Southwestern Bell, and US West have sufficient experience in the provision of dark fiber service to support the development of averaged rates.

32. The record on which the *ICB Order* was based indicated that there were approximately 20 clearly identified dark fiber ICBs in the LECs' tariffs at that time.[10] Subsequent to the *ICB Order*, the LECs filed tariff revisions which reveal that certain carriers have substantial experience in providing dark fiber service. Specifically, Southwestern Bell filed tariff revisions to "clarify" that more than 120 of its ICBs previously not clearly identified are in fact dark fiber, which therefore need not be converted to generally available rates.[11] Similarly, a survey of currently effective tariff provisions in conjunction with our review of pending tariff revisions filed in direct response to the *ICB Order* shows that: Bell Atlantic has four ICBs consisting of 32 dark fibers in addition to 52 ICBs (any of which may involve more than one dark fiber installation) that are "single-mode" or "multi-mode" fibers;[12] BellSouth has nine ICBs consisting of 34 fibers;[13] and US West has at least 12 ICBs consisting of 52 fibers.[14]

33. We find that Southwestern Bell, Bell Atlantic, BellSouth and US West do have ample experience with dark fiber service and are in a position to develop generally available, averaged dark fiber service rates.[15] Although some of this information was not clearly revealed in the original record, Section 1.106(c)(2) of our rules, 47 C.F.R. § 1.106(c)(2), permits the consideration of facts not previously presented to the Commission in reconsideration proceedings if the Commission concludes that the public interest so requires.[16] In this instance, we believe that the public interest requires consideration of the actual extent of dark fiber demand evinced by the carriers' tariffs. We conclude that the newly-supplemented record demonstrates that these LECs have sufficient experience in the provision of dark fiber service to justify the development of averaged rates. Since these carriers have tariffed this service as ICB offerings, they must now offer dark fiber as a generally available service at averaged rates. Accordingly, we direct the affected LECs to amend their dark fiber ICBs to terminate not later than one year from the release date of this Order. We further direct these LECs to file general rates for dark fiber service, to be effective on 45 days' notice, not later than 30 days from the release date of this Order.

34. Consistent with our findings in the *ICB Order*, we further conclude that the other LECs involved in this proceeding do not have sufficient experience with dark fiber to develop general rates at this time. Any future dark fiber ICB filing will be considered in light of the filing carrier's track record in provisioning dark fiber service and the carrier's explanation of why the service should be offered at ICB rates.

VIII. DS3 - EQUIVALENT SERVICES

35. The *ICB Order* directed LECs to replace ICBs for DS3s and DS3-equivalents with a general tariff. Locate and MFS ask us to amend or clarify the Order to state that "dim fiber," "hubbing arrangements," "diverse routing,"[17] and special construction services[18] are DS3-equivalent and subject to the general rate requirement of the *ICB Order*. Locate Petition at 17-20; MFS Petition at 21-24. Locate and MFS assert that such offerings are technically and operationally indistinguishable from DS3 service, and are being used by the LECs to circumvent the *ICB Order*.

36. Pacific argues, and Ameritech concurs, that diverse routing and special construction arrangements are not DS3 equivalent services and that the pricing of these arrangements does not allow a carrier to circumvent the averaged rate schedule for DS3 or DS3-equivalent services because charges for these services are in addition to the tariffed rate customers pay for the services they order. Pacific Opposition at 5-6; Ameritech Opposition at 12-14. SWB argues that diverse routing and other special provisioning of DS3 service are customer specific and should not be required to be offered at a general tariffed rate. SWB Opposition at 10-11. BellSouth argues that the issue of whether the *ICB Order* should apply to diverse routing, hubbing arrangements, and special construction arrangements is a question of fact that can only be resolved within the context of the specific tariff filings initiating such services. BellSouth Opposition at 5.

37. MFS claims that BellSouth's opposition admits that facility hub arrangements, special construction and diverse routing may all be DS3-equivalent services, and that SWB admits that diverse routing is functionally equivalent to DS3 service. MFS Reply at 6. In light of these admissions, contends MFS, this Commission should require LECs to offer these DS3-equivalent services at averaged rates. *Id.*

38. The record in this proceeding would not be sufficient to justify a finding that all diverse routing, special construction, or hubbing arrangement services are equivalent to DS3 service. Therefore, we decline to deem these service offerings DS3-equivalent services at this time. Our conclusion in the *ICB Order* that LECs must justify all departures from general rates is not, however, limited to DS3s or DS3-equivalents. We accordingly expect that future LEC ICB filings for any service will explain the justification for offering a particular service on an ICB basis.

IX. ORDERING CLAUSES

39. Accordingly, IT IS ORDERED that the Bell Atlantic, BellSouth, Southwestern Bell, and US West SHALL FILE tariff revisions in compliance with this Order not later than 30 days after the release date of this Order to be effective on not less than 45 days notice.

40. IT IS FURTHER ORDERED that the petitions for reconsideration filed by Southwestern Bell Telephone Company, Star Tel Transmission Co., Inc., and Williams Telecommunications Group, Inc., ARE DENIED.

41. IT IS FURTHER ORDERED that the petitions for partial reconsideration and clarification filed by Local Area Telecommunications, Inc., and Metropolitan Fiber Systems, Inc. ARE GRANTED to the extent indicated herein and ARE OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Listing of Petitions, Oppositions and Replies

Petitions

1. Local Area Telecommunications, Inc. (Locate), Petition for Partial Reconsideration and Clarification, filed January 18, 1990.

2. Metropolitan Fiber Systems, Inc. (MFS), Petition for Partial Reconsideration and Clarification, filed January 18, 1990.

3. Southwestern Bell Telephone Company (SWB), Petition for Reconsideration, filed January 17, 1990.

4. Star Tel Transmission Co., Inc. (Star Tel), filed January 25, 1990 (late filed).

5. Williams Telecommunications Group, Inc. (WTG), Petition for Reconsideration and Clarification, filed January 18, 1990.

Oppositions

1. Ad Hoc Telecommunications Users Committee (Ad Hoc) Opposition to SWB and WTG, filed January 31, 1990.

2. Ameritech Operating Companies (Ameritech) Opposition to MFS and Locate, filed February 1, 1990 (late filed).

3. Association for Local Telecommunications Services (ALTS) Opposition to SWB, filed January 29, 1990.

4. BellSouth Telephone Companies (BellSouth) Opposition to MFS, WTG and Locate, filed January 31, 1990.

5. Communications Transmission, Inc. (CTI) Opposition to SWB, filed January 31, 1990.

6. MFS Opposition to SWB and WTG, filed January 29, 1990.

7. Pacific Bell Opposition to MFS and Locate, filed February 12, 1990.

8. SWB Opposition to MFS, Locate and WTG, filed January 31, 1990.

9. Teleport Communications Group (Teleport) Opposition to SWB, filed January 31, 1990.

10. US West Opposition to MFS and Locate, filed January 29, 1990, and US West Erratum to Opposition, filed January 31, 1990.

Replies

1. Locate Reply, filed February 20, 1990.

2. MFS Reply, filed February 20, 1990.

3. SWB Reply, filed February 12, 1990.

4. WTG Reply, filed February 14, 1990, and WTG Erratum to Reply, filed February 15, 1990.

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 89-339, Memorandum Opinion and Order, 4 FCC Rcd 8634 (1989) (*ICB Order*).

[2] DS3 service is a high-capacity special access service that provides capacity equivalent to 28 DS1 circuits or 672 voice-grade special access circuits.

[3] Tariff revisions filed by the LECs in response to the *ICB Order* are scheduled to become effective April 17, 1990.

[4] Investigation of Access Related Tariffs, CC Docket No. 83-1145, Phase I, Memorandum Opinion and Order, 97 FCC 2d 1082 (1984).

[5] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, FCC 88-321, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*), Order on Reconsideration, FCC 89-330, released Jan. 19, 1990 (*Strategic Pricing Reconsideration Order*), *further recon. pending.*

[6] Generally, an optical interface is the point of termination or interconnection of an optical fiber at a central office or customer premise.

[7] BellSouth does not currently have a tariff offering for an optical interface.

[8] Ameritech says we should reject this suggestion because the *ICB Order* does not require LECs to provide any credit for up-front payments if a customer prematurely terminates service. As previously noted, termination of service upon the expiration of ICBs would not be premature.

[9] *See ICB Order*, 4 FCC Rcd at 8642 (citing *Sea - Land Services, Inc. v. ICC*, 738 F.2d 1311, 1317 (D.C. Cir. 1984); AT&T Communications, 4 FCC Rcd 4932, 4938 (1989), *recon. denied*, 4 FCC Rcd 7928 (1989)).

[10] These cases would represent a greater number of dark fiber installations since ICB cases frequently cover several dark fiber installations for the same customer.

[11] *See* Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1922, filed Jan. 9, 1990, and Transmittal No. 1929, filed Jan. 17, 1990.

[12] *See* Bell Atlantic Tariff F.C.C. No. 1, Section 12; Transmittal Nos. 344 and 345. Bell Atlantic is not proposing to convert these "single-mode" or "multi-mode" fibers to general tariff rates. We conclude, therefore, that these are dark fiber arrangements because, otherwise, Bell Atlantic would be required to convert them to general rates by the terms of the *ICB Order*.

[13] *See* BellSouth Tariff F.C.C. No. 4, Section 12; Transmittal No. 288.

[14] *See* US West Tariff F.C.C. No. 1, Section 12; Transmittal Nos. 45 and 46.

[15] In light of the fact that carriers have filed tariffs for dark fiber service and thereby acceded to the Commission's jurisdiction, we need not address the question of our Title II authority to compel such carriers to file tariffs.

[16] Section 1.106, by its terms, establishes requirements for petitions for reconsideration and subsection (c)(2) authorizes petitioners to rely upon new information in certain limited circumstances. In addition, however, the Commission may, on our own motion, take any action that we are authorized to take on the motion of a party.

[17] These terms, with the exception of special construction, are used by carriers to describe facilities whose specific configurations vary by carrier. In general, "dim fiber" refers to the provision of DS3 service with electronics provided by the LEC at one end of the fiber; "hubbing arrangements" refer to DS3 services which traverse a carrier's designated end offices before termination at a customer's premise; and "diverse routing" has been used to describe the provision of a designated alternative route that acts as a back-up in the event the primary route is rendered inoperable.

[18] Special construction service is provided pursuant to the carriers' Special Construction tariffs.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-343

In re Applications of

FRANCIS G. TOCE (hereafter "Toce")	File No. BPH-890110MB
WAYNE COUNTY PROFESSIONAL BROADCASTERS (hereafter "Wayne")	File No. BPH-890112MA
BRIDGEPORT MINORITY WOMEN BROADCASTERS, INC. (hereafter "Minority")	File No. BPH-890112MG
EDWARDS - GRAY COMMUNICATIONS, INC. (hereafter "Edwards")	File No. BPH-890112MI
PROGRAMMED COMMUNICATIONS, INC. (hereafter "PCI")	File No. BPH-890112MO
VALERIE E. WOOTEN BROADCASTING COMPANY, LTD. (hereafter "Wooten")	File No. BPH-890112MP
ELIZABETH LEE STACKIEWICZ (hereafter "Stackiewicz")	File No. BPH-890112MR

For Construction Permit for a
New FM Station on Channel 258A (99.5 MHz)
in Bridgeport, New York

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 6, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Toce*. On May 18, 1989, the applicant filed a timely minor change amendment to change the status of the applicant from a corporation to a sole-proprietorship. Mr. Robert J. Raide, the original president, director and 50% owner of the corporation, has withdrawn his participation. As originally submitted, the application designates Mr. Raide as the individual responsible for implementation of the Equal Employment Opportunity Program. The amendment does not specify a change in this information. Accordingly, Toce will be required to submit an amendment to clarify this information to the presiding Administrative Law Judge within 30 days after this Order is released.

3. *Minority*. Minority petitioned for leave to amend its application on June 27 and October 4, 1989. The accompanying amendments were filed after May 25, 1989, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. Data submitted by the applicants indicates there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That Toce submit an amendment as required by paragraph 2, above, to the presiding Administrative Law Judge within 30 days after this Order is released.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Minority ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-432

In re Applications of

WELCH COMMUNICATIONS, INC. File No. BPH-870827MY

SWAN CREEK COMMUNICATIONS File No. BPH-870827NJ

For Construction Permit for
New FM Station, Channel 297A,
Swanton, Ohio

MEMORANDUM OPINION AND ORDER

Adopted: July 20, 1990; Released: August 7, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Before the Review Board is the *Initial Decision*, 5 FCC Rcd 2927 (1990), of Administrative Law Judge Walter C. Miller (ALJ), as well as exceptions filed by Welch Communications, Inc. (Welch) on June 8, 1990, and a reply thereto of Swan Creek Communications (Swan), filed June 20, 1990. Based upon our review of these documents, it is determined that this proceeding must be remanded to the ALJ for additional hearings and the preparation of a *Supplemental Initial Decision*.

2. In its Exceptions, Welch notes that Swan filed its instant application for Swanton, Ohio on August 27, 1987. Some seven months later, on April 4, 1988, Swan also filed an application for a new facility at Lima, Ohio (File No. BPH-880407MD). In both applications, Swan affirmatively certified that it had "reasonable assurance" of sufficient net liquid assets to construct and operate each proposed facility. The application forms utilized by Swan (*see* FCC Form 301, Instructions, Section III) provided as follows:

> An applicant for a new station must certify that is has sufficient net liquid assets on hand or committed sources of funds to construct the proposed facility and operate for three months, without revenue.

Additionally, the certifications specifically required by Questions 1 and 2 of Section III, FCC Form 301, in each application were as follows:

> 1. The applicant certifies that sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue.
>
> 2. The applicant certifies that: (a) it has a reasonable assurance of a present firm intention for each agreement to furnish capital or purchase capital stock by parties to the application, each loan banks, financial institutions or others, and each purchase of equipment or credit; (b) it can and will meet all contractual requirements as to collateral, guarantees, and capital investment . . . .

3. However, Welch argues that it was demonstrated at hearing in the instant proceeding that Swan "had relied on the same personal assets to construct both . . . stations and that the assets were not sufficient to enable them to build both." (Exceptions at 2). In support of this claim, Welch references the following hearing testimony of Swan General Partner Jerry Toth (Tr. 326-29; emphases added):

> [Welch Counsel]: . . . It is a fact that you and Tom have joined together and filed for another construction permit since filing for this one?
>
> [Toth]: Yes, we have applied for Lima.
>
> * * *
>
> [Counsel]: What -- is the source of financing for the Lima application the same source of financing that you are relying on in the Swan Creek Application?
>
> [Toth]: The source of financing would have been the same, had the Swanton application -- or should the Swanton application not be successful.
>
> * * *
>
> [Counsel]: You said now if the Swanton application is --
>
> [Toth]: Unsuccessful --
>
> [Counsel]: Unsuccessful, then your are relying on your assets and your partner's assets to construct Lima, is that your testimony?
>
> [Toth]: Yes.
>
> [Counsel]: What happens if your application for Swanton is successful, that's what we are concerned about.
>
> [Toth]: It's been talked about at great length with my partner, we have not decided yet.
>
> [ALJ]: I will tell you what bothers me, something more than it bothers Mr. Hart, what if they are both successful? What if both are granted?
>
> [Toth]: I would be on cloud nine, sir.
>
> [ALJ]: Have you discussed how you are going to finance it? How you are going to finance both Lima and Swanton?
>
> [Toth]: Are you posing a question to me?
>
> [ALJ]: Yes. Have you discussed that with Tom?
>
> [Toth]: *Yes, we have discussed it. It has come up and there is no way we could finance both of them.*
>
> [ALJ]: *You are going to have to dismiss one of them* ?

[Toth]: *I don' t know if I want to say dismiss, there is a chance that we could combine with another applicant that is down there.*

[ALJ]: Down where, in Lima?

[Toth]: In Lima, yes. Lima was applied for as a second possibility, should Swanton not be successful. Tom and I want a radio station and because the filing windows were so far apart, not realizing that this was going to take so long --

[ALJ]: Fine, I understand --

[Toth]: We had the possibility of a second chance on getting an FM.

[ALJ]: Do I understand you're saying to me that you are willing to take one of of two? Is that what you are really saying?

[Toth]: *Yes, sir, we are just trying to cover ourselves.*

[ALJ]: And your preference is Swanton over Lima?

[Toth]: Exactly.

4. Following this colloquy, [1] Welch sought to enlarge issues against Swan as to its financial qualifications. By *Memorandum Opinion and Order*, FCC 89M-1530, released May 25, 1989, the ALJ declined to add the requested issues, opining that Welch had filed its Motion too late, and that it had "failed to show that Swan Creek has misrepresented [its] finances or grossly omitted some decisionally significant financial item that would render [its] proposal totally defective."

5. The Board finds that the testimony of Swan's principals raises substantial and material questions of fact as to Swan's basic financial qualifications, and further whether Swan misrepresented its qualifications to the Commission. As Swan concedes in its Reply Exceptions (at n. 1):

> Swan Creek applied for the Swanton facility August 27, 1987. It applied for the Lima facility April 7, 1988. Both applications were filed *pro se*. The hearing in this proceeding was held beginning March 27, 1989 (Phase 1). The Lima application was dismissed by Swan Creek by letter to the Mass Media Bureau May 8, 1989.

Thus, for more than one year (between at least April 7, 1988 and May 8, 1989) when both of Swan's applications were pending before the Commission, Swan essentially concedes that it was not financially qualified to construct and operate *both* these proposed facilities. Consequently, the affirmative financial certifications contained in both applications could not have been validly operative at the same time.

6. In its Reply Exceptions, Swan merely argues that no "questions" were raised as to whether Swan "was able to finance the construction and operation of both stations" (Reply at para. 7), and that (*id.*):

> The testimony of Jerry Toth as to the inability to finance both stations made no reference to Swan Creek's initial ability to finance both stations, but rather referred to their ability at the time of the hearing to finance both. Significant costs having been incurred by Swan Creek in the interim in the active prosecution of the Swanton facility, it appeared no longer feasible to construct both stations.

However, nothing has been proferred to support the claim that Swan's inability to finance both facilities resulted from "significant costs" incurred in the prosecution of its instant application. Rather, the record thus far suggests that Swan's General Partners were aware from the outset that they did not possess the requisite funds to construct and operate both facilities as proposed.

7. It is fundamental that an applicant be financially qualified to build the station for which the construction permit is awarded and to have a sufficient reserve of unencumbered capital to operate the station for the initial start-up period without reliance on prospective advertising revenues, *Dutchess Communications Corp.*, 101 FCC 2d 243, 244 (Rev. Bd. 1985); *See also United Broadcasting Co.*, 93 FCC 2d 482, 505-509 (1983); *GACO Communications Corp.*, 94 FCC 2d 761, 775 (Rev. Bd. 1983), *review denied*, FCC 84-212, released May 14, 1984, and the truthfulness and accuracy of the certifications of such financial qualifications are of paramount importance. *Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 50 RR 2d 381 (1981). Indeed, the Commission has expressed great concern that many applicants have abused its certification procedure. *Revision of Application for Construction Permit (FCC Form 301)*, 4 FCC Rcd 3853, 3858-59 (1989)(quoting *Public Notice*, 62 RR 2d 638 (1987)). [2] In light of the foregoing evidence of record to date, we must agree with Welch that these unresolved matters raise substantial and material questions of fact as to Swan's financial certifications, and whether Swan has deceived the Commission in its certification of two applications when it appears to know it could only afford to finance (at best) only one. These potentially disqualifying questions must be explored in a further evidentiary hearing. *San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7007 (1987).

8. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the Presiding Officer for further hearing and the preparation of a Supplemental Initial Decision on the following issues:

> 1. To determine whether Swan Creek Communications is and/or was financially qualified to construct and operate its proposed facility; and,
>
> 2. To determine whether Swan Creek Communications lacked candor and/or misrepresented its financial qualifications to the Commission, and the effect thereof on its basic qualifications to be a Commission licensee.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Swan's other General Partner, Thomas Gardull, also testified as follows (Tr. 344-345; emphasis added):

> [Q]: Turning to the Lima, Ohio, application, if both applications were granted, *Mr. Toth testified that you and he had agreed that you did not have enough resources to do both projects. Do you agree with that?*
>
> [A]: *I agree with that.* Let me back off, there are certainly very cheap ways of putting a radio station on the air and I am afraid that wouldn't win us at a comparative hearing, but there are still ways that I guess I could put a radio station on the air for next to no money, being an engineer I have sources of equipment.

[2] Indeed, because of the magnitude of certification abuse, the Commission's 1989 *Revision* of its Form 301 has substantially strengthened the financial showings required of new applicants. *See Revision*, at 3859.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WESTERN UNION CORPORATION,
Complainant,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File Nos. E-87-47
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	E-87-48
SOUTHWESTERN BELL TELEPHONE COMPANY,	E-87-49
PACIFIC TELEPHONE COMPANY,	E-87-50
NEW YORK TELEPHONE COMPANY,	E-87-51
NORTHWESTERN BELL TELEPHONE COMPANY,	E-87-52
SOUTH CENTRAL BELL TELEPHONE COMPANY,	E-87-53

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: July 24, 1990; Released: August 6, 1990

By the Commission:

1. Western Union Corporation (Western Union)[1] filed complaints against the above-named local exchange carriers (hereinafter referred to collectively as the BOCs) in which it alleges that the BOCs have violated Sections 201(b) and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b) and 203(c), by applying charges for intrabuilding connecting circuits inconsistent with their respective tariffs and thus overcharging Western Union. For the reasons set forth below, we find that the BOCs have violated Section 203(c) of the Act in their provision of intrabuilding circuits to Western Union.

I. BACKGROUND

2. Western Union offers Telex, TWX and various private line services. Rather than building its own costly and duplicative local distribution network, Western Union usually relies on the already established local distribution facilities of local telephone companies. However, in several concentrated urban areas, such as lower Manhattan where Western Union has a multitude of customers, it constructed its own local distribution network to connect its operation centers to its customers' premises. Typically, these customers are in multitenant office buildings. Western Union would connect its local loop to "intrabuilding" circuits already established by the local telephone company to reach telephone company customers' premises because construction of its own intrabuilding circuits would have required the consent and cooperation of the building owner which, Western Union claims, was often difficult or impossible to obtain.[2]

3. Prior to 1976, the Commission permitted local exchange carriers to provide intrabuilding circuits and other connecting facilities to carriers on an untariffed basis through what were called "Exchange of Facilities Agreements." However, as a result of a settlement in Docket No. 20099, the Commission directed that these facilities would henceforth have to be provided under tariff. *See AT & T*, 47 FCC 2d 660 (1975), *further order* at 52 FCC 2d 727 (1975), *aff'd sub nom. Carpenter v. FCC*, 539 F.2d 242 (D.C. Cir. 1976). The rates for these facilities were originally contained in AT&T Tariff F.C.C. No. 55, Facilities for Other Common Carriers. Subsequent to the divestiture of AT&T, Tariff No. 55 was replaced by one issued by the newly formed Exchange Carrier Association (ECA). The BOCs subsequently issued their own respective tariffs which are the ones at issue here.

II. WESTERN UNION'S CONTENTIONS

4. The BOCs charge Western Union for each intrabuilding circuit on the basis of two voice-grade channel terminations plus an inside wire recovery charge. [3] Western Union contends that this charge is unreasonable because these circuits do not comport with the definition of channel termination in the tariff. Citing Southern Bell's Tariff F.C.C. No. 61 as a representative example, since the other tariffs are essentially identical,[4] Western Union points to Section 7.1.2(A) which defines "channel termination" in pertinent part as follows:

> The Channel Termination rate category provides for the communications path between a customer's designated premises and the serving wire center of that premises. Included as part of the Channel Termination is a standard channel interface arrangement which defines the technical characterics associated with the type of facilities to which the access service is to be connected at the Point of Termination (POT) and the type of signalling capability, if any . . . . One Channel Termination charge applies per customer designated premises at which the channel is terminated. This charge will apply even if the customer designated premises and the serving wire center are colocated in a Telephone Company building.

5. Based on this description, Western Union contends that these intrabuilding circuits do not fall within the category of service charged because such circuits never transit a serving wire center (commonly referred to as a central office). Western Union argues that if the BOCs intended to apply the Channel Termination rate category to these intrabuilding circuits based on this description, then the tariff language is ambiguous. Western Union further argues that in the event of any ambiguities, they are to be resolved against the carriers. Therefore, Western Union argues that it was unlawful under Section 203(c) for the BOCs to apply this rate structure to the intrabuilding circuits it leased from the BOCs.

6. Similarly, Western Union contends that it was unlawful for the BOCs to have charged it for the Inside Wire Recovery Charge under the tariffs. It cites Section 7.4.9 of Southern Bell's Tariff F.C.C. No. 61[5] which defines this charge as:

> [A] charge to recover that portion of the inside wire cost that is assigned to Special Access Service. Accordingly, the charge applies on a per Channel Termination basis for Metallic, Telegraph Grade, Voice Grade, Program Audio, or Digital Data Special Access Services unless all such inside wire is provided by the customer . . . .

Western Union argues that since the channel termination charge cannot apply, neither can the Inside Wire Recovery Charge.

7. Finally, Western Union contends that, even assuming, *arguendo*, that the rate structure at issue does apply, the charges are unreasonable under the circumstances. It claims that these rates were designed to recoup costs, *i.e.*, the average costs of subscriber line loops, associated central office equipment, facility interfaces, voice grade performance equipment, hybrid options, and signalling equipment, not associated with the house cable and inside wire which Western Union claims is all that is employed in the furnishing of these intrabuilding circuits.

III. BOCS' CONTENTIONS

8. The BOCs, on the other hand, claim that the rate structure and corresponding tariff description at issue in the Western Union complaints cover intrabuilding circuits in accordance with guidelines promulgated by the Commission in *Private Line Rate Structures Guidelines*, 97 FCC 2d 923 (1984). They contend that Western Union's prime contention, *i.e.*, that the rate structure should be determined by physical characteristics and routing of the facility, was rejected by the Commission early in the development of the tariffs for special access services and that these complaints are really an after-the-fact attempt by Western Union to obtain reconsideration of prior Commission actions.

9. The BOCs further contend that predecessors to the special access tariffs at issue in these complaints were initially submitted by the ECA and were among the most controversial of the access filings because they represented major rate and rate structure changes from previous private line service arrangements and because of the disparity which existed among exchange carriers in the rates charged for equivalent services. Thus, the BOCs claim that the ECA proposed rate structure received close scrutiny by the Commission. As developed in the ECA tariff, that structure consisted of four subelements or rate categories: (1) access connection, (2) special transport, (3) features and functions, and (4) special access lines. With the exception of features and functions, the other subelements reflected a system of pricing which the Commission determined was based upon physical routing or network configuration. The BOCs contend that the Commission found this structure to be unreasonable because it created significant disparities in the pricing of equivalent services and did not adequately reflect customer service choices or the actual costs of service provision. *See, e.g.*, Answer of Southern Bell Telephone and Telegraph Company, at 8-11; *See also Investigation of Access and Divestiture Related Tariffs (Access Tariffs Order)*, 97 FCC 2d 1082 at 1249-50, 1252, 1253 (1984).

10. The BOCs note that amended tariffs filed by ECA were twice suspended by the Commission and ultimately rejected as violative of the Act. The BOCs note further that the Commission promulgated rules, codified in 47 C.F.R. § 61.40, which provide guidelines for assuring that private line tariffs are just, reasonable, and nondiscriminatory. The BOCs state that tentative Commission endorsement was given to the NECA[6] rate structure proposal that became effective April 1, 1985 which employed three rate elements consisting of: (1) channel termination, (2) channel mileage, and (3) optional features and functions. This structure was the one subsequently adopted by the BOCs and is contained in the tariffs at issue here. The channel termination element replaced the local channel and connecting channel categories to provide a single rate element for the communications link between a designated customer premises and exchange carrier facilities or another designated customer premises. Moreover, the BOCs state that in further response to the Commission's direction to eliminate physical routing as a major cost determinant, all interoffice channel mileage was removed from the channel termination rate. Thus, the BOCs contend that intrabuilding circuits furnished to Western Union are communications links which are functionally similar to other services provided through the channel termination rate element. The BOCs state that to limit application of this element to connections associated with a serving wire center would require the redefinition of rate elements based upon considerations of physical routing and network configuration.

11. The BOCs also contend that Western Union is not correct in its assumption that intrabuilding cable is the exclusive means of providing service between two designated customer premises located in the same building. The BOCs maintain that where intrabuilding facilities are available and their use is economically advantageous, local exchange carriers may employ a configuration like that described by Western Union. In other cases, however, the BOCs state that the communications path may require routing through the central office and the use of associated outside plant facilities. The BOCs aver that the determination of the appropriate provisioning mechanism is a matter for the local exchange carrier.

IV. DISCUSSION

12. The issue before us is whether the channel termination rate category in the BOCs' tariffs encompasses the service taken by Western Union. We observe initially that, under Part 69 of our Rules, 47 C.F.R. § 69.01, *et seq.*, the

service taken is one that would properly be provided within the BOCs' special access tariffs of which the channel termination rate category is a part. Additionally, these special access tariffs must be consistent with the Commission's policies articulated in the Special Access proceeding in that the tariff should reflect rates based on the service provided and not physical routing. *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, Phase I, FCC 86-52 (released Jan. 24 1986) (*Special Access Order*), *aff'd*, 1 FCC Rcd 427 (1987), *remanded on other grounds sub nom. Western Union Corp. v. FCC*, 856 F.2d 315 (D.C. Cir. 1988). The tariffs plainly read, however:

> The Channel Termination rate category provides for the communications path between a customer's designated premises and the serving wire center of that premises.

See e.g., Bell Atlantic, Tariff FCC No. 1, Section 7.1.2(A). Thus, to the extent that the service provided to Western Union does not transit a serving wire center, it does not fall within the plain meaning of the sections of the tariff cited by the BOCs. No party suggests that another section of the BOC special access tariffs might apply to the service provided to Western Union.

13. Tariff language is required to be clear and definite. 47 C.F.R. § 61.54(j). Further, the meaning and intent of the carrier must be construed from the tariff language alone. *Associated Press*, 72 FCC 2d 760 (1979). Once the charges, classifications, regulations, or practices have been filed and published in accordance with the Act, carriers cannot charge or collect rates other than these published rates. 47 U.S.C. § 203(a). Although the special access service at issue here appears functionally similar to other services provided pursuant to the Channel Termination rate category, and the carriers apparently intended the channel termination provision to apply to this service, the plain meaning of the channel termination charge as described by the tariff does not apply. Conceivably, it should be simple for the BOCs to amend their tariffs in such manner as to extend the coverage of the Channel Termination rate category to include intrabuilding circuits which do not connect with a serving wire center. However, until such remedial amendments are proposed (and become effective), the BOCs cannot apply the Channel Termination rate to the service provided to Western Union. On the issue of liability, therefore, we find for Western Union.

14. Western Union maintains that it is entitled to damages. It argues that the "average cost" structure applied to it for intrabuilding circuits by the BOCs is unreasonable, and, moreover, that reasonable charges would be based on physical routing or network configuration.

15. Western Union will be permitted to pursue its damage allegations in supplemental complaint proceedings. In such proceedings, which must be initiated within the timeframe provided by our rules,[7] Western Union bears the burden of proving that it actually has been damaged.

16. In an effort to facilitate potential future litigation of damages issues, we note that Western Union's analysis thus far of Commission rules and policies concerning appropriate special access ratemaking methodologies, including those applicable to the intrabuilding circuits at issue here, appears to be seriously flawed. Contrary to Western Union's claims, the Commission repeatedly has rejected contentions that rates, in order to be just and reasonable, must be based on physical routing characteristics or on the costs of the actual facilities used to provide service to a particular customer.[8] If Western Union chooses to file supplemental complaints, its pleadings should address this apparent dichotomy.

V. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, that the above-referenced complaints of Western Union ARE GRANTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, that Western Union may file supplemental complaints concerning damages in accordance with Commission Rules. *See* 47 C.F.R § 1.722.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Formerly known as The Western Union Telegraph Company.

[2] Such telephone company-installed intrabuilding circuits are commonly referred to as "house cable" or "riser cable." *See* 47 C.F.R. § 32.2426. It is cable in subscriber buildings that runs through, *e.g.*, various floors, and is located on the telephone company's side of the demarcation point. This particular type of facility was not detariffed by the Commission's Order in Detariffing of Customer Premises Equipment and Customer Provided Cable/Wiring, 48 Fed. Reg. 50534 (1983). That portion of the facilities that run from the house cable to the demarcation point should be recorded as "Other Terminal Equipment Expense". *See* 47 C.F.R. § 32.6362. The Detariffing Order affected the wire on the customers' side of the demarcation point.

[3] This is equivalent to the tariff charge for providing special access service connecting two customer premises.

[4] Structurally these tariffs are identical in content with only minor textual and sectional designation differences. While the actual rates differ, that fact is not decisional to the resolution herein.

[5] Again, the BOC tariffs are structurally identical with only minor differences.

[6] The ECA is now known as the National Exchange Carrier Association.

[7] 47 C.F.R. § 1.722.

[8] *See e.g.*, *Special Access Order*, at paras. 62 - 70 (Commission rejects argument that costs recovered from cost causers by tariffed rates must refer to costs of specific pieces of equipment used to provide service to particular customers); *Access Tariffs Order*, 97 FCC 2d at 1248-59 (Commission determines that special access rate structure should reflect the nature or function of the service rendered, rather than emphasize physical characteristics); *Private Line Rate Structure Guidelines*, 97 FCC 2d 923, 934-41 (1984) (rate development should reflect average cost of providing service, not cost of equipment/facilities used to

provide service to a particular customer); *see also Western Union v. Cincinnati Bell Telephone Co.*, 2 FCC Rcd 5852 (Com. Bur. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

TELECOM*USA, INC.,
Transferor,

and File No. ENF-90-08

MCI COMMUNICATIONS CORPORATION, and MCI CAPITAL, INC., Transferees,
File No. 13416-CF-TC-(20)-90
File No 13417-CF-TC-(21)-90
File No. 13418-CF-TC-(10)-90
File No. 23960-CD-TC-1-90
File No. 23963-CD-TC-1-90
File No. 23964-CD-TC-1-90
File No. 05329-CL-TC-1-90
File No. I-T-C-90-098-(9) TC

For Consent to the
Transfer of
Control of
SouthernNet Systems,
Inc., SouthernNet of South Carolina,
Inc., Teleconnect Long Distance
Services & Systems Company,
TS Communications, Inc., Teleconnect
Company, and Southland Telephone Company

MEMORANDUM OPINION AND ORDER

Adopted July 30, 1990; Released August 1, 1990

By the Chief, Common Carrier Bureau:

1. On April 27, 1990, MCI Communications Corporation (MCI), MCI Capital, Inc. (MCICI)[1] and Telecom*USA, Inc. (Telecom) filed applications pursuant to Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a), 310(d), for consent to transfer control to MCI of radio licenses, and certain Section 214 authorizations for resale of international service, held by subsidiaries of Telecom.[2] For reasons discussed below, we conclude that the proposed transaction will serve the public interest and that the applications should be granted.

2. MCI provides interstate interexchange and international common carrier communications services and a variety of enhanced services in both the domestic and international markets through its subsidiaries. [3] Through its regional operating subsidiaries, Telecom provides domestic interexchange and international telecommunications common carrier services to customers located principally in the nation's Southeast, Midwest and West. Services are provided over Telecom's digital fiber optic and microwave transmission network and through interconnection with other carriers.[4]

3. Pursuant to the parties' merger agreement (Agreement and Plan of Merger, dated April 8, 1990), MCI, MCICI and Telecom (Applicants) propose that MCICI be merged into Telecom, which would be the surviving company.[5] The directors of MCICI prior to the merger would be the directors of Telecom thereafter. Following the merger, 1000 shares of Telecom will be issued and outstanding, all of which would be owned by MCI. The licenses and authorizations now held by Telecom's subsidiaries would continue to be held by those companies.

4. According to Applicants, the proposed merger would serve the public interest in the following ways. MCI and Telecom's ability to provide high quality telecommunications services to the public would be strengthened. They would benefit from reduction of marketing, administrative and overhead costs. The Applicants represent that the merger would improve their ability to achieve economies of scale which are important to a carrier's ability to compete effectively in the market. They also state that use of MCI's national network would significantly reduce Telecom's leased facility and access costs. MCI's capability to provide high-quality, facilities-based service would be enhanced by its acquisition of Telecom's digital fiber optic and microwave network. The proposed transaction would also provide the opportunity to sell Telecom products, such as its STAR card, voice messaging system and call conferencing, to MCI's larger national customer base. The merger would permit MCI and Telecom to develop new products jointly through their combined research and development resources. Applicants state that Telecom has a demonstrated ability to develop new software and engineering products, while MCI not only has its own innovative products, but also has a large sales network and name recognition that would speed diffusion of new products. Further, the merger would allow MCI and Telecom to develop and offer a greater variety of new services more quickly and efficiently and at lower cost than either company could individually. MCI's broader service offerings, *e.g.*, enhanced 800 service, virtual network services, international service, and operator services, would enable Telecom to increase significantly its market penetration and revenues from its existing customers.[6]

5. In urging prompt grant of the subject applications, Applicants state that:

> [a]s with other acquisitions that the Commission has found would improve competition and serve the public interest, this merger is pro-competitive. MCI and Telecom have participated in prior mergers and acquisitions and the result has been more vigorous competition with AT&T, the dominant carrier, in particular, and in the entire market in general, with increasing services and decreasing prices to the public. AT&T remains the dominant carrier with at least a 70% share of the revenues in the interexchange market. In contrast, MCI has only a 12.6% share and Telecom has a 1.3% share. The parties believe that this merger will further increase competition with resulting benefits to the public.[7]

6. On May 7, 1990, we gave public notice of the applications and invited comments from interested parties.[8] No comments were timely filed with the Commission in response to such notice.[9]

DISCUSSION

7. Sections 214(a) and 310(d) of the Act require that we find that the public interest, convenience, and necessity will be served by the transfer of control of a company holding Section 214 certificates and radio licenses. Subsumed therein is the requirement that the Commission review, as may be appropriate, the citizenship, character, financial, technical and other qualifications of the transfer applicant.[10] We conclude that MCI, a long-term Commission licensee and interstate and international communications carrier, satisfies the Commission's threshhold qualification requirements and has the financial wherewithal and technical expertise to provide service consistent with the public convenience and necessity.

8. Section 7 of the Clayton Act proscribes the acquisition of the stock, other share capital, or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly."[11] The legislative history "illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). Under Section 11 of that statute, the Commission is empowered with direct enforcement authority over Section 7 in the case of common carriers.[12] The courts have construed this to mean that the requirements of Section 11 of the Clayton Act and the applicable provisions of the Communications Act "are satisfied when the Commission seriously considers the antitrust consequences of a proposal and weighs the consequences with other public interest factors."[13] In other words, the Commission is required to consider anticompetitive consequences as one part of its public interest calculus.[14]

9. We note initially that the Department of Justice had an opportunity to review the subject application as well as a filing made pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a). It did not object to the proposed acquisition or otherwise question its lawfulness. We have independently reviewed the material filed pursuant to the Hart-Scott-Rodino Act and have concluded that no basis is provided therein to deny the proposed transaction.

10. In the domestic *Competitive Carrier Rule Making* proceeding in CC Docket No. 79-252, after using an antitrust analysis of market power, the Commission adopted streamlined regulations for certain carriers without market power (nondominant carriers) in light of the increasingly competitive domestic communications market.[15] The Commission expressly identified MCI as one of the specialized common carriers it found were nondominant carriers.[16]

11. No objection has been raised to grant of the subject applications, nor has any evidence been presented to show that MCI's acquisition of Telecom would have any anticompetitive effect or require a change from its current classification as a nondominant carrier. In terms of total toll revenues for interexchange telecommunications,[17] AT&T had a 67.4% share of the market in 1989, MCI 12.1%, US Sprint 8.5%, and Telecom approximately 1.4%.[18] In terms of the overall market for interstate switched minutes,[19] AT&T had a 64.3% share as of the first quarter of 1990.[20] Although the nation's second and fourth largest interexchange carrier operators would be combined by the proposed merger, we perceive no anticompetitive or antitrust consequences resulting from such transaction. Such combination would continue to be subject to vigorous competition with AT&T, US Sprint and more than two hundred other facilities based and non-facilities based carriers.[21]

CONCLUSION

12. The record shows that MCI's acquisition of Telecom should enhance their ability to provide high quality telecommunications services to the public, reduce their marketing, administrative and overhead costs and reduce leased facility and access costs for Telecom, among other benefits foreseen by Applicants.[22] We conclude that the proposed merger should result in more vigorous competition with AT&T and other interexchange carriers. We find that MCI is legally, technically, financially and otherwise qualified to operate Telecom's telecommunications licensees and that grant of the subject applications for consent to transfer control of Telecom to MCI will serve the public interest, convenience and necessity.

ORDERING CLAUSES AND CERTIFICATE

13. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Applications of Telecom*USA, Inc., MCI Communications Corporation, and MCI Capital, Inc. filed April 27, 1990 for consent to transfer control of SouthernNet Systems, Inc., SouthernNet of South Carolina, Inc., Teleconnect Company, Teleconnect Long Distance Services and Systems Company, and TS Communications, Inc., ARE GRANTED.

14. IT IS CERTIFIED, pursuant to 47 U.S.C. § 214(c), that the transfer of control over authorizations for resale of international switched-voice services approved in this order (File No. I-T-C-90-098-(9)-TC) WILL SERVE the public interest, convenience and necessity.

15. IT IS FURTHER ORDERED that this order shall be effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] MCICI is an indirect, wholly-owned subsidiary of MCI and was formed to effectuate MCI's acquisition of Telecom.

[2] The authorizations for which transfer of control is requested were specified in a Public Notice released May 7, 1990, 5 FCC Rcd 3043 (Com. Car. Bur. 1990) (Public Notice) which is hereby incorporated by reference. Section 214(a) provides, in pertinent part, that no carrier shall acquire any line unless it first obtains from the Commission a certificate that the present or future public convenience and necessity require such acquisition. Section 310(d) provides generally that no radio construction permit

or license shall be transferred without an application to the Commission and its finding that the public interest, convenience and necessity will be served.

[3] MCI owns directly or indirectly MCI Telecommunications Corporation, MCI International Telecommunications Corporation, MCI International, Inc., Satellite Business Systems, and Western Union International, Inc. On March 31, 1990, RCA Global Communications, Inc. was merged into Western Union International, Inc.

[4] Telecom subsidiaries holding radio licenses here involved are SouthernNet Systems Inc., SouthernNet of South Carolina, Inc., Teleconnect Company, Teleconnect Long Distance Services & Systems Company, and TS Communications, Inc. In the subject Application, MCI and Telecom seek contingent authority to transfer control of licenses held by Southland Telephone Company (Southland), a former Telecom subsidiary, in the event that its acquisition by Rochester Telephone Company (Rochester) had not been closed by the effective date of the Telecom/MCI merger. Such request now is moot since Rochester's acquisition of Southland was consummated on June 28, 1990. Letter from Peter A. Rohrbach to Donna R. Searcy (July 5, 1990) (File No. 24023-CD-TC-1-90).

[5] At the time the proposed merger becomes effective, outstanding shares of Telecom would be converted into the right to receive cash at the rate of $42 per share. Options to purchase shares of Telecom granted pursuant to Telecom's benefit plans would be cancelled prior to the effective date of the merger in exchange for $42 per share minus the option's exercise price. Restricted stock awards issued by Telecom would be cancelled in exchange for $42 for each share subject to such awards. Applicants estimate that, based on the number of shares, options and awards currently issued and outstanding, the total to be paid to current holders of Telecom shares, options and awards would be approximately $1.25 billion.

[6] Application at 5-6.

[7] *Id.* at 7 (footnote omitted).

[8] Public Notice, *supra*, at 2-3.

[9] On June 11, 1990, the Ameritech Operating Companies (Ameritech) submitted late-filed comments neither favoring nor opposing the proposed merger. On June 13, 1990, MCI and Telecom filed separate responses to the pleading. Ameritech subsequently withdrew its comments on June 18, 1990.

[10] *See* 47 U.S.C. §§ 308(b), 310(d).

[11] 15 U.S.C. § 18.

[12] *Id.* at § 21.

[13] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980).

[14] *Id.* at 87, citing Denver and Rio Grande W. R. R. v. United States, 387 U.S. 485 (1967).

[15] Policies and Rules Concerning Rates and Facilities Authorizations for Competitive Carrier Services, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), *reconsideration denied*, 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (Oct. 15, 1983), Fourth Report and Order, 95 FCC 2d 554 (1983), Fifth Report and Order, 98 FCC 2d 1191 (1984), *reconsideration denied*, FCC 85-572 (released Nov. 20, 1985), Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated on other grounds sub nom.*, MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

[16] First Report and Order, *supra*, 85 FCC 2d at 28 n.69. As nondominant carriers, MCI and Telecom have blanket Section 214 authorization with respect to the domestic market. 47 C.F.R. § 63.07(a). Both MCI and Telecom are also regulated as nondominant in the provision of international telecommunications. *See* Int'l Competitive Carrier Policies, 102 FCC 2d 812, 815 (1985), *reconsideration denied*, 60 R.R. 2d 1435 (1986). Telecom is engaged in international telecommunications only as a reseller. We note that to the extent that Telecom or MCI should seek to serve any international point through a separate entity, such as International Carrier Group (ICG), additional Section 214 authorizations for international services are and will be required.

[17] The revenues reported include both interstate and intrastate toll calls, including international calls.

[18] Long Distance Market Shares: First Quarter, 1990, released June 22, 1990 by the Industry Analysis Division, Common Carrier Bureau, Mimeo No. 3727, at Table 4. At the end of June 1989, about 79% of the nation's telephone lines were presubscribed to AT&T, 11% to MCI, and 6% to US Sprint, *id.* at 4 and Table 5. The National Exchange Carrier Association (NECA) reported Telecom having 533,516 presubscribed lines, giving it 0.4% of the nation's lines. NECA Historic Presubscribed Lines by Qualified Interexchange Carriers, Exh. A. A calculation in terms of fiber mileage indicates that MCI had 12% of interexchange deployed miles of fiber strand in 1989 and Telecom had 0.9%, compared to 44% for AT&T, 27% for US Sprint and 12% for Wiltel. Jonathan M. Kraushaar, Fiber Deployment Update, End of Year 1989, released February 28, 1990 by the Industry Analysis Division, Common Carrier Bureau, Mimeo No. 1943, at Table 1. These fiber mile estimates do not take account of differences in working circuit capacities due to differences in the attached electronics. However, they do give an indication of the potential for future shifts in the market.

[19] The minutes reported include both interstate and international switched minutes.

[20] Long Distance Market Shares: First Quarter, 1990, *supra*, at Table 3. Looking separately at the provision of international telecommunications, MCI had a 7% share of the international message telephone service (IMTS) market in 1988, as measured by total revenues, and Telecom, through its subsidiaries, had a share of less than one percent. *See* International Communications Traffic Data Report for 1988, released October 11, 1989 by the Industry Analysis Division, Common Carrier Bureau. *See also* Trends in the International Telecommunications Industry, 1975-1988, released December 5, 1989 by the Industry Analysis Division, Common Carrier Bureau. Thus, MCI's acquisition of Section 214 authorizations held by Telecom subsidiaries would not affect MCI's lack of market power generally over international telecommunications services.

[21] *See* Long Distance Market Shares, *supra* note 20, at Table 5.

[22] *See para. 4, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of Open Network
Architecture Plans

ORDER

Adopted: February 26, 1990; Released: February 27, 1990

By the Commission:

1. The *BOC ONA Order* [1] announced the establishment of a Federal/State Joint Conference, pursuant to Section 410(b) of the Communications Act,[2] as an ongoing forum for state/federal cooperation to facilitate the development and implementation of Open Network Architecture (ONA). The Order stated that the Conference members would include the Chairman of this Commission, who will serve as Conference Chairman, one additional member of this Commission, and seven state Commissioners, one from each Bell Operating Company region. The Order also provided that we would appoint the state members in consultation with the National Association of Regulatory Utility Commissioners (NARUC). On May 4, 1989, we appointed two federal Commissioners and eleven state Commissioners to the Joint Conference. [3] On November 7, 1989, we filled some vacancies on the Joint Conference and added a third Federal Commissioner.[4]

2. We hereby appoint Commissioner Marta Greytok of the Texas Public Utilities Commission (PUC) to the Joint Conference to fill a vacancy resulting from the departure of Commissioner James M. Fischer of the Missouri Public Service Commission. Commissioner Greytok was nominated by NARUC to serve on the Joint Conference.[5]

3. Accordingly, IT IS ORDERED, that Marta Greytok, Texas PUC Commissioner, IS APPOINTED as a member of the Federal/State Joint Conference convened in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 110, paras. 214-223 (1989) (*BOC ONA Order), pets. for recon. pending; app. for review pending sub nom., Pacific Bell and Nevada Bell v. FCC,* No. 89-1194 (D.C. Cir.).

[2] 47 U.S.C. § 410(b).

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 4017 (1989).

[4] In the Matter of Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 8217 (1989).

[5] Letter to Alfred C. Sikes, Chairman, FCC, from Paul Rodgers, Administrative Director, General Counsel, NARUC, Feb. 14, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase II, Part 1

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: August 1, 1990

By the Commission:

I. INTRODUCTION

1. Four local exchange carriers (LECs) have filed petitions for reconsideration of the *Refund Order* [1] in this phase of this docket, which concluded that certain strategically-set special access rates were unlawful, and directed certain LECs to make refunds.[2] In this Order, we grant the petitions seeking reconsideration of Digital Data Service (DDS) refunds and otherwise deny the petitions.

II. DISCUSSION

2. The petitioners raise a number of challenges to our *Refund Order*. In the following paragraphs, we summarize the petitioners' arguments and our analysis of those arguments, *seriatim*.

A. Use of Guidelines Generally

3. The instant phase of the special access docket has been described as the strategic pricing phase because carriers were directed to justify the practice of establishing certain special access rates at levels that exceed the costs of those services, to achieve what the LECs described as "strategic" objectives. After receiving extensive pleadings on this subject, the Commission adopted the *Strategic Pricing Order*,[3] which determined that such a practice is unlawful under some circumstances and adopted criteria or guidelines for determining the lawfulness of strategic rates. The *Strategic Pricing Order* also determined that high capacity or HiCap charges would be deemed to be strategically priced for purposes of applying those guidelines if the rate for a HiCap facility of average length was less than four times or more than eight times the rate for a 4-wire voice grade circuit of average length.

4. The *Strategic Pricing Order* did not make a final determination with respect to the lawfulness of particular rates. The LECs were afforded an additional opportunity to demonstrate that their rates were consistent with the guidelines before the Commission applied the guidelines to determine the lawfulness of particular rates. In our *Refund Order*, we reviewed the pleadings filed in response to the *Strategic Pricing Order* and found that some of the strategic rates did not comply with these guidelines.

5. Some petitioners contend that it is improper to apply such guidelines to determine refunds. CBT claims that the *1985 Designation Order* initiated a generic notice and comment proceeding on non-cost-based rates that culminated in the announcement of guidelines for prospective application to subsequent annual access filings. CBT asserts that it had no notice of its duty to comply with the guidelines and that application of the guidelines to the rates under investigation in this proceeding constitutes a denial of due process. CBT Petition at 1-3, 16. BellSouth also argues that the guidelines were intended for prospective use. BellSouth contends that our application of the guidelines to the rates under investigation in this docket materially alters the allegedly prospective nature of the guidelines without opportunity for LECs to comment on this departure. BellSouth Petition at 5-6.[4]

6. Ad Hoc challenges the petitioners' assertion that the first guideline is applied retroactively by the *Order*, and asserts that the LECs had ample notice of that guideline's requirements because it represents a restatement of a valid return prescription adopted in 1983 and enforced on the category level since 1985. Ad Hoc Opposition at 5-6. Moreover, Ad Hoc contends, strategic pricing has been under investigation since September 30, 1985, a fact that it argues clearly placed carriers on notice that their strategic rates might be found unlawful. The longstanding Commission policy that rates be justified in relation to the cost of providing service, Ad Hoc contends, meant that LECs priced strategically at their own risk, including the risk of refunds. Ad Hoc Opposition at 5-6.

7. We reject the petitioners' arguments. Although Section 204(a) proceedings are Rule Makings of particular applicability, *see* 5 U.S.C. § 551(4), the Commission's authority under the section is not limited to a prospective determination of the lawfulness of rates. Rather, as a tradeoff for permitting rates under investigation to go into effect, Section 204(a) specifically authorizes the Commission to order refunds at the conclusion of such a proceeding if such relief is appropriate. Thus, it is obvious from the nature of the statutory scheme, and from the fact that this proceeding was commenced through a Designation Order rather than a Notice of Proposed Rule Making, that any conclusions this Commission reached with respect to the lawfulness of strategic pricing would be applied to rates that took effect subject to the investigation, and that the Commission would exercise its statutory authority to determine whether a refund was appropriate.

8. If petitioners are contending that the Commission cannot properly apply to rates under investigation criteria articulated at the conclusion of a tariff investigation, such a contention is clearly incorrect. It will always be true that, at the end of a Section 204(a) investigation, the Commission will reach conclusions of law and apply those conclusions to the facts developed in the record. Obviously, neither the carriers nor the Commission will know at the outset of the investigation what those conclusions will be. Such a process does not constitute retroactive ratemaking or retroactive Rule Making. Such Commission action merely applies the obligations imposed by the statute or previously adopted Commission rules to particular carrier conduct.

9. Moreover, the claim that carriers were denied notice and an opportunity for comment in this docket is simply incorrect as a factual matter. Having developed the strategic pricing guidelines as a tool for assessing the lawfulness of the rates under investigation, we could have simply

applied them to the carriers' rates and taken final action as to unlawful rates. Instead, we invited further comment on whether the rates under investigation complied with the guidelines. *Strategic Pricing Order*, 4 FCC Rcd at 4803-04. Under these circumstances, we believe petitioners' due process rights have been more than adequately protected.

10. Accordingly, claims that we departed from the *Designation Order* or the *Strategic Pricing Order* by applying guidelines to current or past rates and claims that we failed to provide adequate notice that we would do so are not well founded.

B. Use of the Overearnings Guideline

11. Although none of the petitions for reconsideration of the *Strategic Pricing Order* challenged the first guideline, which required compliance with the rate of return requirement for the special access category as a whole, some LECs that failed to satisfy that guideline now contend that the first guideline cannot be applied to determine the lawfulness of their rates. BellSouth contends that the decision in *AT & T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988), "absolutely prohibits the Commission from employing Part 65's rate of return prescription to gauge the reasonableness of earnings below the level of total interstate access services." BellSouth Petition at 4. *See also* CBT Reply at 3-5 (*AT & T* case vacated Part 65 so violation of earnings requirements is impossible).

12. That interpretation of the *AT & T* case is incorrect. The *AT & T* decision related to those Part 65 rules that established particular automatic refund mechanisms for enforcing rate of return prescriptions. The requirement that LECs target special access rates to produce a return for the special access element or category as a whole that equals the authorized or target return for interstate access was adopted in the Part 69 access rules which were affirmed in relevant part several years earlier by a different panel of that Court.[5] In these circumstances, *AT & T* could not be construed to eliminate the prescription of a target return for the special access category.

13. CBT argues that we should not consider overearnings in computing strategic pricing refunds because such a refund would have the same impact as the Part 65 rate of return enforcement mechanism the Court examined in the *AT & T* case. CBT Petition at 13. This refund in fact differs from that enforcement mechanism in several respects. The Part 65 mechanism was designed to implement Sections 4(i) and 205 of the Act by automatically recapturing overearnings in perpetuity without further Commission action. This refund is neither automatic nor recurrent, and is under a different section of the Act. We exercised the equitable discretion expressly conferred by Section 204(a) of the Act to order a refund in this particular proceeding of rates permitted to go into effect pending the outcome of this investigation. The circumstances should not recur because LECs will not be engaging in strategic pricing in the future.

14. Moreover, our refund in this docket is not simply an attempt to enforce our category rate of return requirements. Petitioners who claim that strategic pricing overcharges are not sufficiently linked to special access overearnings to attribute those overearnings to strategically priced rates mischaracterize this Commission's action in the *Refund Order*. We did not purport to identify the category overearnings "caused" by strategically priced sub-category rates and to refund that amount. We instructed the LECs to refund the *lesser* of (1) the amount by which their rates exceeded the reasonable range for HiCap services (*i.e.*, the Voice Grade/HiCap rate crossover range), or (2) their category overearnings. We could have required the LECs to refund the former amount regardless of whether that amount exceeded category overearnings and thereby forced the LECs to earn less than their authorized return for special access as a category. We chose instead to exercise our equitable discretion and limit a LECs' refund liability to category overearnings.

C. DDS Rates

15. Pacific contends that the refunds to its Digital Data Service (DDS) customers required by the *Refund Order* are arbitrary and capricious, because the Commission made no finding that DDS rates in 1987-88 were unjust and unreasonable, and also failed to articulate any relationship between the DDS refund and that service's cost or earnings. Pacific also asserts that the Commission fails to describe any nexus between DDS earnings and category overearnings, and has never specified either a just and reasonable DDS rate or a range of reasonableness within which DDS rates would be presumptively lawful. Pacific's DDS rates for 1987 and 1988, it asserts, were substantially lower than rates in effect in 1985 and 1986. Pacific asserts that the Commission found the 1985-86 rates lawful. Pacific Petition at 5-7.

16. In the *Refund Order*, the carriers' failure to meet their evidentiary burden of demonstrating that their DDS rates were just and reasonable led us to conclude that these rates were unlawful and that a refund was justified. The development of a refund methodology was complicated by the carriers' silence concerning the reasonable level of DDS rates. Accordingly, we concluded that a refund to DDS customers of that service's *pro rata* share of any special access category overearnings would produce the most reasonable approximation of just and reasonable DDS rates.

17. Upon reconsideration and further review of the record in this docket, we have decided to vacate our finding that the DDS rates under investigation were unlawful. We first discussed the issue of the lawfulness of strategically priced DDS rates in the *Annual 1987 Access Filing Order*.[6] In that Order, we noted that several LECs had stated that their DDS rates were strategically priced. We accepted those rates subject to investigation of the lawfulness of such pricing in this docket. We did not issue in this docket any further order designating with greater specificity the issues under investigation for DDS. Had the Commission provided adequate notice of the issues under investigation, a carrier's failure to introduce evidence into the record would provide a basis for an adverse finding. Under these circumstances, we conclude that a determination that particular DDS rates are or are not just and reasonable would not be appropriate based on the record before us. We accordingly vacate our conclusion with respect to the lawfulness of DDS rates and the DDS refund requirements in this docket. That action is, of course, without prejudice to the filing or disposition of complaints under Section 208 of the Communications Act, 47 U.S.C. § 208 relating to DDS rates.

D. Section 204 Refund Authority

18. All petitioners assert that the Commission's action in the *Refund Order* exceeds the refund authority established by Section 204 of the Communications Act, 47 U.S.C. § 204. Pacific, Southwestern and CBT assert that Section 204(a) of the Act authorizes refunds only to the extent that revenues are "received by reason of" new or increased charges, and requires the imposition of an accounting order for the exercise of this refund authority.[7] Pacific Petition at 4-5; Southwestern Petition at 9; CBT Petition at 6-7. Ad Hoc notes that the Commission stated in the *1988 Annual Access Reconsideration Order* [8] that the Commission does have authority to order refunds if excessive charges represent decreases from prior charges, but refrained from exercising that power in that proceeding. Ad Hoc Opposition at 3-5, 9.

19. This proceeding does not present the question of our authority to order refunds of decreased charges. The Act authorizes the Commission to order refunds of "new" charges and that is the authority exercised in this case. This docket was established to investigate the initial post-divestiture special access charges that became effective in the spring of 1985. The HiCap charges of all the LECs have been under continuous investigation since that time. Although many of the rates have been revised from time to time during the course of this investigation, all of the revised rates have been subject to the outcome of a continuing investigation of rates that were clearly "new" when the investigation commenced.

20. We also reject the contention that the imposition of an accounting order is a condition precedent to refunds under Section 204(a). The Commission has already determined that this is not the case. *See Annual 1985 Access Tariff Filings*, 4 FCC Rcd 3959, 3961-62 (1989), petition for review pending, BellSouth Corporation et al. v. FCC & USA, D. C. Cir. No. 89-1380.

E. Cincinnati Overearnings Computation

21. CBT contends that the refund should be adjusted because the refund required of it in the *Refund Order* was based upon an incorrect number on its FCC Form 492. CBT states that it achieved a return of 12.78 percent rather than 13.48 percent for the 1987-88 period. Our reexamination of the CBT Form 492 earnings reports indicates that CBT recorded a disallowance adopted in CC Docket 88-1 twice in its computation of its return for the special access category. Correction for that error does reduce the CBT return to 12.78 percent, reduces overearnings by $522,846, and accordingly reduces the CBT refund liability by $522,846. Therefore, we grant the CBT petition insofar as that petition requests that adjustment in CBT's refund.

F. Escrow Contentions

22. BellSouth seeks reconsideration of the requirement that the refund amounts be placed in escrow. BellSouth states that the escrow requirements of the *Refund Order* -- leaving investment decisions to the sole control of the escrow agent, and burdening the carrier with administrative costs -- are unnecessary to protect customers and unfairly burdensome to carriers. BellSouth asserts that the administrative costs should be borne by the escrow account, and warns that the escrow agent may be less creditworthy than the carrier thereby increasing the risks faced by refund beneficiaries. BellSouth Petition at 6-8.[9]

23. Under the authority delegated to it to oversee the refund process, the Common Carrier Bureau on April 2, 1990 issued an Order clarifying the carriers' escrow account requirements.[10] The Bureau there noted that the purpose of the escrow mechanism is to eliminate incentives to delay the refund process, and to avoid a premature distribution to customers that might be inconsistent with the final resolution of any disputes concerning the carriers' refund obligations. These objectives are not furthered by permitting carriers to retain, and benefit, from funds determined by the Commission to be unlawful overcharges. The assignment of administrative costs to the carriers further encourages prompt settlement of refund matters. Whatever the respective creditworthiness of the LEC and its escrow agent, the escrow account will maintain the LEC's incentive to resolve outstanding refund obligations promptly. Thus, petitioners have stated no sound reason why our decision to require that refund amounts be placed in escrow should be reconsidered.

G. Interest

24. Several petitioners seek changes or clarifications in the calculation of interest accrual to refund principals. Pacific states that the interest provision in para. 37 of the *Refund Order* could be construed to require accrual on total refund amounts from the beginning of the monitoring period, rather than the incremental attribution of interest to successive months' earnings as rates were billed. Pacific states that it intends to follow the latter method unless instructed otherwise. Pacific Petition at 8. Ameritech states that the Commission's theory of liability rests on excess earnings for an entire two-year period, so that earnings cannot be deemed excessive until that period concludes. Moreover, Ameritech argues, the Commission has not explained its departure from the past practice of computing interest from the first day after the earnings period concludes. Ameritech Comments at 18-19.

25. CBT states that it understands the *Order* to require it to pay interest for all of 1987 and 1988 despite the fact that it claims to have overearned in only two quarters. CBT argues that interest should only attach from the third quarter of 1988, when it contends its overearnings commenced, as the purpose of interest is to compensate the refund recipient rather than penalize the carrier. CBT Petition at 21-22. BellSouth asserts that requiring interest at a predetermined IRS rate may cause losses to LECs if actual earnings on the account are not commensurate with interest accrued at the designated rate. BellSouth also contends an interest requirement unrelated to the interest actually accrued on the account is arbitrary and capricious. BellSouth Petition at 8.

26. In response to the contentions of Pacific, Ameritech, and CBT, we clarify the *Refund Order* to specify the attribution of interest at the IRS rate from the time excess charges are billed until establishment of the escrow account. The purpose of an investigation under Section 204 is to determine the lawfulness of questioned rates, and ultimately avoid the burden of excessive charges to customers, including the loss of use of funds. The burden of rates ultimately found unlawful attaches at the time the customer first pays such a rate. We therefore require carriers implementing refund obligations under the *Order* to accrue interest upon excessive rates from the date such rates are billed.

27. The application of interest at the IRS rate is established Commission practice.[11] However, the IRS rate should be applied only until the date of deposit in escrow; after that point, the interest owed customers as part of the refund obligation is limited to that accrued by the account under the administration of the escrow agent.

III. ORDERING CLAUSES

28. IT IS THEREFORE ORDERED, that the amount of $854,000 attributed to Cincinnati Bell Telephone Company in Attachment B of the *Refund Order* IS REDUCED to the amount of $331,154 for the reasons stated in para. 21, *supra*.

29. IT IS FURTHER ORDERED, that interest on overearnings to be refunded to customers pursuant to the *Refund Order* WILL ACCRUE at the IRS rate from the date excessive rates were first billed, as stated in paras. 26-27, *supra*, to the date of escrow deposit and thereafter at the rate realized by the escrow account.

30. IT IS FURTHER ORDERED, that the determination of unlawfulness respecting DDS rates for the period under investigation, and the associated refund liabilities imposed by the *Refund Order* with respect to DDS service, ARE RESCINDED for the reasons stated in paras. 16-17, *supra*.

31. IT IS FURTHER ORDERED that carriers may reduce their escrow deposits to reflect the rescission of DDS refund obligations in para. 30, *supra*. Carriers shall report actions taken under authority of this paragraph within five business days of the action.

32. IT IS FURTHER ORDERED, that the petitions to reconsider the *Refund Order*, filed by the BellSouth Telephone Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company, Cincinnati Bell Telephone Company, Pacific Bell and Nevada Bell, and Southwestern Bell Telephone Company, ARE DENIED except to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 412 (1990) (*Refund Order*).

[2] Petitions were filed by the BellSouth Telephone Companies, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), Cincinnati Bell Telephone Company (CBT), Pacific Bell and Nevada Bell (Pacific), and Southwestern Bell Telephone Company (SWB). The Ameritech Operating Companies (Ameritech) filed comments supporting these petitions, and the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed an opposition to the petitions. Replies to Ad Hoc's opposition were filed by CBT and BellSouth.

[3] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Order on Reconsideration, 5 FCC Rcd 400 (1990) (*Strategic Pricing Reconsideration*).

[4] *See also* Pacific Petition at 4 (refund is retroactive Rule Making).

[5] MTS and WATS Market Structure, 93 FCC 2d 241 (1983), *recon.*, 97 FCC 2d 682 (1983), *further recon.*, 97 FCC 2d 834 (1984), *aff'd in principal part and remanded in part*, National Ass'n of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *further recon.*, 99 FCC 2d 708 (1984), 101 FCC 2d 1222 (1985), *further recon.*, 102 FCC 2d 849 (1985).

[6] Annual 1987 Access Tariff Filings, Mimeo No. 1322, released Dec. 31, 1986 (*Annual 1987 Access Filing Order*).

[7] Ameritech claims that a suspension is also a condition precedent for a Section 204(a) refund and asserts that 1987 Ohio Bell and Wisconsin Bell rates were not suspended. Ameritech Comments at 13-16. Ameritech is foreclosed from seeking reconsideration of its refund obligations because it failed to file a timely petition. Moreover, we have determined that a suspension is not a condition precedent for a Section 204(a) refund. Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 3965, 3966 (1989) (*Annual 1988 Access Reconsideration*), petition for review pending, Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company et al. v. FCC & USA, D. C. Cir. Nos. 89-1081 *et al.*

[8] *Annual 1988 Access Reconsideration*, 4 FCC Rcd at 3966.

[9] BellSouth states that this includes the risk that the escrow agent will resort to judicial interpleader proceedings to resolve any disputes that may arise concerning disposition of the refund amounts.

[10] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, DA 90-542, Memorandum Opinion and Order, Apr. 2, 1990 (Com. Car. Bur.).

[11] *See* Communications Satellite Corporation, 2 FCC Rcd 3706, 3716 n.57 (1987); American Tel. & Tel. Co., 89 FCC 2d 369 (1982), *affirmed sub nom.* RCA Global Communications, Inc. v. FCC, 717 F.2d 1429 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-363

In re Applications of

GREAT PLAINS CHRISTIAN RADIO, INC. File No. BPED-880823MA

SOUND BROADCASTING, INC. File No. BPH-880825OC

For Construction Permit for a
New FM Station on Channel 256C1
in Copeland, Kansas

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 9, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

3. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

4. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

5. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

6. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 90.175 of the Commission's Rules Governing the Frequency Coordination Process — RM-6908

ORDER

Adopted: August 1, 1990; Released: August 9, 1990

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. The International Association of Fire Chiefs, Inc. (IAFC) and the International Municipal Signal Association (IMSA) seek amendment of Section 90.175(b) of the Commission's Rules, 47 C.F.R. § 90.175(b), "in a manner that would require Public Safety and Special Emergency applicants for 800 MHz assignments to apprise the Commission and all . . . coordinators of their continuing need for licensed assignments . . . below 800 MHz."[1] The concerns identified by IAFC/IMSA are adequately addressed by the Commission's National Public Safety Plan (National Plan).[2] We therefore conclude that further action on the IAFC/IMSA proposal should not be undertaken at this time.

II. BACKGROUND

2. The United States Congress has directed the Commission to review and satisfy the public safety needs of both state and local public safety entities. [3] To accomplish this task, the Commission has allocated six megahertz of spectrum in the 821-824 MHz and 866-869 MHz bands for public safety use, nationwide.[4] The Commission has also developed a National Plan to ensure that public safety entities use the new and existing public safety frequencies effectively. The Commission's National Plan, among other things, establishes fifty-five planning regions and instructs each region to develop a plan for use of the new public safety spectrum to meet the current and future mobile communications requirements of public safety and special emergency entities operating in the region. All interested parties are encouraged to participate in the development of these plans. Interested parties have another opportunity to participate when the individual regional plans are placed on public notice by the Commission.[5]

3. IAFC/IMSA contend that many public safety entities are vacating their frequencies below 800 MHz and migrating to the 821-824/866-869 MHz bands.[6] Despite the potential availability of frequencies below 800 MHz, IAFC/IMSA contend that coordination requests cannot be met because they cannot accurately identify unused frequencies below 800 MHz.[7] To solve this problem, IAFC/IMSA propose that the Commission amend Section 90.175(b) to require applicants for the new 800 MHz public safety channels to inform the Associated Public-Safety Communications Officers, Inc. (APCO)[8] of their current frequency assignments below 800 MHz and indicate whether they plan to vacate or continue using these frequencies.[9] Applicants who do not have assignments would indicate that they are currently not licensed below 800 MHz. Applicants who have identified assignments would either explain their continuing need for the frequencies or project a date when they will be vacating them. APCO, in turn, would apprise the Commission and all public safety frequency coordinators of spectrum below 800 MHz of the identity of the 800 MHz applicant, the proposed station location, number of 800 MHz assignments requested, and the rest of the information that the applicant will supply to APCO.

4. IAFC/IMSA also suggest that the coordinators communicate on a bi-weekly basis through electronic mail for the exchange of this information.[10] IAFC/IMSA contend that adopting its proposal will enable it and other coordinators to respond to frequency coordination requests for channels below 800 MHz, handle requests for interservice sharing and coordination, aid the Commission in improving spectrum efficiency and prevent public safety entities from hoarding frequencies.[11]

5. The IAFC/IMSA proposal elicited comments from six parties.[12] Three parties support the proposal, contending that the National Plan is inadequate to accomplish the IAFC/IMSA objectives and others as well. For example, SIRSA, UTC and NABER argue that the Plan is inadequate because it covers only the 821-824/866-869 MHz frequencies and does not ensure that unused or vacated frequencies below 800 MHz will ever be returned to the Commission.[13] SIRSA also argues that the Plan does not cover situations when the spectrum needs of licensees change after the regional plan is formulated.[14] These parties, therefore, suggest various modifications to the rule changes proposed by IAFC/IMSA. NABER suggests, for instance, that applicants for the new public safety spectrum also be required to supply current assignments above 800 MHz in addition to listing frequencies assigned to them below 800 MHz.[15] SIRSA and UTC recommend that applicants for the new public safety channels be required to report their channel assignments on non-public safety frequencies which would include those obtained through waiver or intercategory sharing.[16] SIRSA and UTC claim that these proposed rule changes would impose a slight but justifiable burden on applicants, considering the significant benefit of possible reassignment of unused spectrum.[17]

6. APCO and the Region 28 and Region 36 Planning Committees oppose the IAFC/IMSA proposal because, they contend, the regional plans already account for the release of lower frequencies on a local level through their "give back" program.[18] Furthermore, APCO asserts that the proposed rule changes would impose additional responsibilities on APCO, the Commission, and applicants.[19] APCO further suggests that participating in the process will provide the IAFC/IMSA with the information it seeks and ensure that current information on planned releases is conveyed to the appropriate frequency coordinators and the Commission.[20]

7. IAFC/IMSA, in their reply comments, state that their proposed rules supplement the National and Regional Plans by providing more detailed information to the Commission and the coordinators.[21] Additionally,

IAFC/IMSA assert that their proposal accounts for changes in needs of licensees between the time the regional plans are submitted and their adoption and implementation.[22] Lastly, IAFC/IMSA advocate that the frequency coordinators, and not the regional planning committees, should control the reassignment of the vacated licenses.[23]

III. DISCUSSION

8. The IAFC/IMSA proposed rule changes would require applicants for the new public safety frequencies to supply additional information with their applications to APCO. Their rule proposals would also require APCO to communicate this information to the Commission and other coordinators. IAFC/IMSA believe that these rule changes are necessary to enable them to identify unused public safety frequencies below 800 MHz so that they can reassign them.

9. The rules proposed by IAFC/IMSA need not be adopted at this time. The Commission's National Plan provides that as licensees move to the new spectrum allocation they must make every effort to give up their lower band frequencies so that others may use them.[24] The regional plans being submitted to the Commission contain "give back" procedures for returning vacated or unused frequencies when obtaining new 800 MHz public safety and special emergency frequencies.[25] The regional planning process allows parties to comment on the adequacy of the "give back" provisions as well as the rest of the plan by participating in the development of the plan and by commenting on the plan when it is placed on public notice. Furthermore, the National Plan includes procedures for modifying regional plans if licensees' needs change after the regional plan has been formulated.[26] While the impetus for the National Plan was the allocation of the additional six megahertz of spectrum at 800 MHz, the proceeding establishing the planning process considered full utilization of all spectrum resources, including the lower frequency bands currently *used* by public safety entities without regard to the actual individual service to which each frequency is *allocated*.

10. IAFC/IMSA have not demonstrated that the current process is inadequate for effective licensing and efficient use of the public safety spectrum. Indeed, they view their proposal as merely a method of obtaining supplemental information to our existing requirements. The regional planning process is still in an early stage. As such, it is premature to change the procedure to impose significant burdens on applicants who would have to compile additional information for their applications, on coordinators who would have to deliver this information to the relevant coordinators and the Commission, and on the Commission who would have to review this additional information. Imposing these additional burdens would not be in the public interest as they would not result in any apparent concomitant benefits beyond those that the National Plan already provides.

CONCLUSION

11. Inherent in the National and Regional planning process is our expectation that public safety entities migrating to the 821-824 MHz and 866-869 MHz band would give back public safety and non-public safety frequencies in other bands for reassignment. Thus, IAFC/IMSA participation in the regional planning process and continued cooperation among all of the Commission's certified coordinators should resolve the problems regarding the availability and reassignment of frequencies below 800 MHz that IAFC/IMSA foresee. The National Plan adequately addresses IAFC/IMSA's concerns and, absent facts that the process is not working as planned, need not be handled through the Commission's rule making authority at this time. We conclude, therefore, that the public interest would not be served by making the rule changes proposed by IAFC/IMSA.

12. Accordingly, pursuant to Sections 0.331, 1.401 and 1.407 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.401 and 1.407, IT IS ORDERED that the IAFC/IMSA Petition, RM-6908, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

FOOTNOTES

[1] Petition for Rule Making, Amendment of Section 90.175 of the Commission's Rules and Regulations, RM 6908, (November 28, 1988) Public Notice, August 1, 1989.

[2] Report and Order, Gen Docket No. 87-112, 3 FCC Rcd 905 (1987).

[3] *See* Federal Communications Commission Authorization Act of 1983, December 8, 1983, P.L. 98-214, 97 Stat. 1467, Section 9(a).

[4] *See Allocation Order*, 2 FCC Rcd 1825, 1838, para. 99, (1986) (allocating the 821-824 MHz/866-869 MHz bands for public safety use on September 19, 1986).

[5] *National Plan*, 3 FCC Rcd 905, para. 54, (1987).

[6] Petition at 5.

[7] Petition at 6.

[8] APCO is the public safety frequency coordinator for 800 MHz frequencies as well as the coordinator for the police and local government radio service frequencies below 800 MHz.

[9] Petition at 7.

[10] Petition at 8. The National Association of Business and Educational Radio, Inc. (NABER) is opposed to electronic mailing, contending that it is too costly to implement. NABER Comments at 5.

[11] Petition at 6, 9.

[12] NABER, the Utilities Telecommunciations Council (UTC), and Special Industrial Radio Service Association (SIRSA) filed comments supporting the Petition. APCO, Region 28 Planning Committee (covering southern New Jersey, eastern Pennsylvania, and Delaware) and Region 36 Planning Committee (covering western Pennsylvania) filed oppositions to the Petition.

[13] SIRSA Comments at 9; UTC Comments at 3-6; NABER Comments at 4-6.

[14] SIRSA Comments at 8.

[15] NABER Comments at 4-5. IAFC/IMSA disagrees with NABER's suggestion because it does not believe that many public safety entities currently licensed above 800 MHz will switch to other 800 MHz frequencies. IAFC/IMSA Reply Comments at 3.

[16] SIRSA Comments at 10; UTC Comments at 4-5.

[17] UTC Comments at 5; SIRSA Comments at 5-6.

[18] APCO Comments at 3-9; Region 28 Planning Committee Comments at 1; Region 36 Planning Committee Comments at 1.

[19] Reply of APCO to Comments of NABER and UTC at 2.

[20] APCO Comments at 5.

[21] Reply Comments at 4.

[22] Reply Comments at 4.

[23] Reply Comments at 5.

[24] *National Plan*, 3 FCC Rcd 905, para. 62, (1987).

[25] APCO Comments at 4-9 (citing several regional plans that provide procedures for licensees to return unused or vacated frequencies). For example, APCO cites the Region 8 Plan: " . . . frequencies presently utilized by a licensee will be turned back for reassignment. The FCC authorized frequency coordinators will be responsible for assignment of the channels in the lower frequency bands." APCO Comments at 6.

[26] 3 FCC Rcd 905, para. 57, (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — Transmittal No. 674
Revisions to Tariff F.C.C. No. 103

MEMORANDUM OPINION AND ORDER

Adopted: July 25, 1990; Released: August 9, 1990

By the Commission:

1. On February 17, 1988, the Common Carrier Bureau issued an Order (*Bureau Order*),[1] rejecting portions of Comsat Transmittal No. 674 and denying various petitions to reject, suspend, or investigate other portions of that transmittal. Pan American Satellite (PAS) has filed an application for review of the Bureau's decision to deny the PAS request for investigation and suspension of the new tariff provisions establishing substantially discounted long-term service arrangements for digital bearer circuits. Although the long-term service option is generally available to all Comsat customers without restriction, the arrangement was designed initially to implement an agreement between Comsat and AT&T. That agreement commits AT&T to obtain specific circuit usage levels from Comsat through 1994 in exchange for rate ceilings on the rates that Comsat charges for those circuits during the relevant period.

2. That AT&T-Comsat agreement was also submitted for consideration in a proceeding the Commission initiated to reexamine circuit loading requirements imposed upon AT&T.[2] PAS also seeks review of a Bureau decision denying a motion to consolidate an investigation of Transmittal No. 674 with that "balanced loading" proceeding. That request was mooted by the Commission's subsequent decision to adopt an Order eliminating the balanced loading requirement and terminating the proceeding.[3]

3. PAS essentially challenges the Bureau's action as erring in three respects. It first contends the Bureau should not have denied the PAS petition before the resolution of the issues implicated in the loading proceeding. PAS notes that the bearer circuit service proposed by Transmittal No. 674 was required by Comsat's agreement with AT&T, and argues that the bearer circuit rates are dependent on traffic forecasts that assume the validity of the agreement with AT&T.[4] PAS further suggests that the agreement's rate ceiling for Comsat's charges to AT&T could squeeze Comsat's profit margin if its costs as a member of Intelsat increase significantly, raising the prospect of overcharging for Comsat's other services. PAS also states the tariff transmittal should not have been permitted to take effect before questions left unanswered by the pending agreement were addressed.[5]

4. Second, PAS asserts the Bureau erred by failing to recognize that Comsat's different rates for service over different routes constitute unreasonable discrimination. Finally, PAS argues that the Bureau erred by permitting Comsat to target a rate of return for its proposed long-term arrangement that would exceed Comsat's authorized return for the first year of service.[6]

5. While the loading proceeding's resolution, *supra* at note 3, renders the first principal contention essentially moot, it bears noting that the arguments raised by PAS in this respect were unpersuasive even when timely. As Comsat notes in its opposition to the PAS application,[7] the prospect that Commission rejection of the underlying agreement would undermine Comsat's traffic volume projections in Transmittal No. 674 was speculative, and provided no substantial basis for delaying proposed tariff revisions. In any case, had this Commission rejected the underlying agreement, we could have required Comsat to make any necessary revision in its tariffs.

6. Nor would the prospect of an Intelsat price squeeze have been cause for an investigation of this tariff. The fundamental purpose of Comsat's agreement with AT&T and the related general offering is to achieve a more stable demand for Comsat circuits, which conduces to a more efficient facility planning process and the moderation of rates. The absence of such an agreement, or an attempt to limit arbitrarily the scope of long-term discounted rates, would more likely create the difficulties PAS suggests. The satellite-based segment of the industry clearly will experience increased pricing pressure from optical cables, and in any case, this Commission's continuing oversight of Comsat is sufficient protection against such hypothetical concerns. Finally, as the Bureau noted, the tariff raised issues distinct from the loading proceeding. *Bureau Order*, 3 FCC Rcd at 1134 n.2.

7. We also are not persuaded that the rate differentials for different service routes warrant reversing the Bureau's decision not to investigate pursuant to Section 204 of the Communications Act, 47 U.S.C. § 204. The Communications Act does not preclude all differentials; Section 202(a) of that Act, 47 U.S.C. § 202(a), prohibits unreasonable discrimination and undue preferences. The rate differentials in question were relatively modest. We find no basis to overturn the Bureau's conclusion that PAS did not demonstrate a sufficient possibility that these differentials will result in unreasonable discrimination or any undue preference to warrant initiating a Section 204 tariff investigation.[8]

8. Finally, while Comsat targeted the rates for the particular services in Transmittal 674 to earn in their first year (1988) returns higher than those authorized for Comsat's services as a whole, the Bureau's decision to refrain from investigating these rates on that premise was not unreasonable. These services represent only a portion of all services provided by Comsat. Comsat is limited to an overall return, not a return on any particular service.[9] We find no basis to overturn the Bureau's conclusion that a Section 204 tariff investigation was not warranted under the circumstances presented by this tariff filing.

9. IT IS THEREFORE ORDERED that the application for review of the Common Carrier Bureau's decision released February 17, 1988 (DA 88-191), filed by Pan American Satellite, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

FOOTNOTES

[1] Communications Satellite Corp., Memorandum Opinion and Order, 3 FCC Rcd 1132 (1988) (*Bureau Order*).

[2] Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, Notice of Proposed Rule Making, 2 FCC Rcd 2109 (1987).

[3] Policy for the Distribution of United States International Carrier Circuits Among Available Facilities During the Post-1988 Period, Memorandum Opinion and Order, 3 FCC Rcd 2156 (1988).

[4] PAS Application at 3.

[5] *Id.* at 4-5.

[6] *Id.* at 6-7.

[7] Communications Satellite Corporation, Opposition to Application for Review, filed Apr. 4, 1988, at 4.

[8] The Bureau's decision to refrain from initiating a Section 204 investigation does not, of course, foreclose a Section 208 complaint based upon a claim that these rate differentials create unreasonable discrimination or an undue preference.

[9] Our decision to affirm the denial of the PAS petition does not, of course, foreclose future Commission action in complaint proceedings alleging that Comsat's overall earnings in a given year exceed the maximum allowable rate of return. Nor does it preclude independent Commission action to enforce the existing, authorized return for Comsat's regulated operations. Comsat's opposition argues at some length that an annual period should not be used to measure its compliance with the rate of return prescription. This argument appears to be irrelevant to the questions presented by this application for review because this Commission has not prescribed an authorized return for this particular service. If Comsat believes we should change existing procedures for measuring and enforcing compliance with Comsat's overall rate of return prescription, Comsat should present its views in an appropriate pleading.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-280

In the Matter of

Alabama Region Public
Safety Plan

ORDER

Adopted: August 1, 1990; Released: August 7, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On May 9, 1990, Region 1 (Alabama) submitted its public safety plan to the Commission for review. The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region.

2. The Alabama plan was placed on Public Notice for comments on June 1, 1990, 55 FR 22085 (May 31, 1990). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Alabama and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Alabama.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Alabama IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Alabama may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: August 7, 1990

SUGAR LAND TELEPHONE COMPANY FILES PETITION FOR WAIVER OF PART 36 RULES TO ESTABLISH NEW STUDY AREA AFTER PURCHASE OF WATERWOOD COMMUNICATIONS, INC. AND TRI-COUNTY TELEPHONE COMPANIES

(PUBLIC COMMENT INVITED)

On July 17, 1990, Sugar Land Telephone Company (Sugar Land) filed a petition for waiver of the definition of "study area" contained in Part 36 of the Commission's Rules in order to establish a new Sugar Land study area in conjunction with the acquisition of Waterwood Communications, Inc. (Waterwood) and its subsidiary Tri-County Telephone Company (Tri-County). All three companies are located in Texas. and Sugar Land requests that it be permitted to include Waterwood and Tri-County in its study area, effective January 1, 1991.

Parties may file comments on this petition no later than **August 27, 1990**. Replies should be filed by **September 10, 1990**. Comments should reference AAD 90-21. A copy of each pleading should be sent to Gene Gold, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division, public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Gene Gold, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PUERTO RICO TELEPHONE COMPANY — File Nos. I-T-C-90-150(TC), S-C-L-90-009-M

Application to Amend the Submarine Cable Landing License for the Transcaribbean Cable System (TCS-1) to Delete Puerto Rico Telephone Company as a Licensee

ORDER AND AUTHORIZATION

Adopted: June 27, 1990; Released: August 7, 1990

By the Chief, International Facilities Division:

1. Puerto Rico Telephone Company (PRTC) filed the above-captioned application which requests authority to amend the cable landing license for the Transcaribbean Cable System (TCS-1) in connection with its proposed transfer of 990 Minimum Assignable Units of Ownership (MAUO) in Segment F of the TCS-1 cable to Telefonica Larga Distancia de Puerto Rico (TLD).[1]

2. PRTC and TLD are separate corporations and are both owned by the Puerto Rico Telephone Authority (PRTA), a public authority created by the government of the Commonwealth of Puerto Rico. In an order released on January 5, 1990, PRTC was authorized to acquire and operate up to 990 MAUOs in Segment F (Florida to Puerto Rico) of the TCS-1 cable to provide private line service between the Puerto Rico and the U.S. mainland.[2] According to the application, PRTA has determined that TLD should be the entity in charge of providing interstate and international telecommunications services. Specifically, PRTC will provide local exchange and intra-island toll service to Puerto Rico, while TLD will provide exclusively off-island (interstate and international) telecommunications services. The application further notes that the need to clearly distinguish between the service offerings of PRTC and TLD is prompted by the projected sale of both companies to private owners.

3. In order to draw a clear demarcation between the service responsibilities of both PRTC and TLD, PRTC proposes to transfer the 990 MAUOs it was authorized to acquire and operate in Segment F of the TCS-1 cable to TLD. PRTC states that under the Commission's *Competitive Carrier* decisions, no additional Commission authorization is required before TLD may acquire and operate the MAUOs in Segment F of the TCS-1 cable to provide interstate message and other interstate telecommunications services. Thus, since it will have no future ownership or interest in the TCS-1 cable, PRTC requests that the TCS-1 Submarine Cable Landing License be amended to delete it as a licensee.

4. Upon review of PRTC's application, we find that a grant of the application, subject to the conditions set forth below, will serve the public convenience and necessity. First, we note that contrary to PRTC's analysis, Section 214 authority is required for the transfer of the 990 MAUOs to TLD. Paragraph 10(b)(3) of the TCS-1 Cable Landing License states that "Neither this License nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensee to any persons, unless the Federal Communications Commission shall give prior consent in writing." Thus, PRTC's reliance on the fact that none of the capacity was ever activated does not relieve it of its duty to file an application to transfer TCS-1 capacity. [3]

5. In its authorization to acquire the subject 990 MAUOs, PRTC's use of the capacity was specifically limited to the provision of domestic private line service. We noted that although PRTC was prohibited from providing off-island message telephone traffic, it was not precluded from providing interstate private line service. Since TLD provides off-island interstate and international service, the potential exists for the use of these circuits to connect with transatlantic facilities in the provision of international service. Thus, the character of these circuits would change from domestic to international. Accordingly, consistent with the underlying authorization for PRTC to acquire the 990 MAUOs, we will require that TLD's use of these circuits be limited to domestic service only.[4] Any use of these circuits to provide international service will require a Section 214 application in accordance with the policy set forth in *International Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986).

6. Accordingly, IT IS ORDERED that PRTC's application to transfer its Section 214 authorization to acquire and operate up to 990 MAUOs in Segment F of the TCS-1 cable to TLD IS GRANTED.

7. IT IS FURTHER ORDERED that the TCS-1 Submarine Cable Landing License (File No. S-C-L-89-003) is hereby amended to delete PRTC as an owner and licensee.

8. IT IS FURTHER ORDERED that all other terms and conditions contained in the Commission's Order authorizing PRTC to acquire the 990 MAUOs shall remain unchanged.

9. IT IS FURTHER ORDERED that TLD shall comply with all terms and conditions imposed on it in previous Commission orders as a result of the Commission's decision in CC Docket No. 86-309.[5]

10. IT IS FURTHER ORDERED that TLD shall file reports of circuit additions required under Section 63.07(b) of the Commission's Rules.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days from the date of public notice of this order. (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] PRTC does not believe that Commission authorization is required to effect the transfer of the 990 MAUOs to TLD, since it has not commenced operating or providing service using this capacity. For the reasons set forth herein, we nonetheless treat this as a request for Section 214 authorization to transfer the circuits to TLD. Since both PRTC and TLD are owned by the Puerto Rico Telephone Authority, we treat the application on a *pro forma* basis.

[2] Puerto Rico Telephone Company, *et al.*, 5 FCC Rcd 100 (1990).

[3] The fact that none of the capacity was activated is relevant to the question of whether authority is needed to discontinue service.

[4] Under our Competitive Carrier decisions, no additional Commission authorization is required for TLD to acquire and operate the 990 MAUOs in Segment F of the TCS-1 cable in order to provide interstate message and other interstate telecommunications services. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* (Fourth Report and Order), 95 FCC 2d 554 (1983); *Fifth Report and Order*, 98 FCC 2d 1191 (1984).

[5] Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, CC Docket No. 86-309, (Report and Order), 2 FCC Rcd 6600 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-345

In re Applications of

MARY ELIZABETH SHELTON d/b/a VALLEY RADIO (Hereafter "Radio")	File No. BPH-881128MB
LOUISVILLE COMMUNITY BROADCASTING, INC. (Hereafter "Louisville")	File No. BPH-881129MA
CHRISTY A. HUTTER (Hereafter "Hutter")	File No. BPH-881130MA
RIVER BROADCASTING LIMITED PARTNERSHIP (Hereafter "River")	File No. BPH-881201MB
MID - AMERICA COMMUNICATIONS, INC. (Hereafter "Mid-America")	File No. BPH-881201MC
HIGH LEVEL COMMUNICATIONS, INC. (Hereafter "High Level")	File No. BPH-881201MD
RAMCOMM (Hereafter "RamComm")	File No. BPH-881201ME
SHARON LEE OLSEN (Hereafter "Olsen")	File No. BPH-881201MG
JERRY L. EAVES (Hereafter "Eaves")	File No. BPH-881201MH
D. E. W. COMMUNICATIONS LIMITED PARTNERSHIP (Hereafter "D.E.W.")	File No. BPH-881201MF [Dismissed Herein]

For Construction Permit for
New FM Station, Channel 290A, 105.9 MHZ in
Valley Station, Kentucky

HEARING DESIGNATION ORDER

Adopted: July 24, 1990; Released: August 9, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *RamComm.* Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by RamComm would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

3. *Olsen.* On April 19, 1990, Olsen filed an amendment to her application to specify a new transmitter site. Olsen's technical consultant, Laura M. Mizrahi, of Communications Technologies, Inc. stated that the amendment was filed because the Federal Aviation Administration (FAA) had determined the site proposed in the original application would constitute an electromagnetic hazard to air navigation. Olsen seeks acceptance of her late-filed amendment under the "good cause" provisions of 47 C.F.R. § 73.3522(a)(2). However, it is incumbent upon applicants seeking to amend their applications pursuant to this rule to plead with specificity the details of the FAA notification. Examples of the information which Olsen could provide, but which she has failed to do, include copies of correspondence received from the FAA or reference to dates of correspondence and names of individuals at the FAA from whom correspondence had been received. Absent this degree of specificity, we are left with only Olsen's unsubstantiated statement that her original site is unacceptable to the FAA. Accordingly, since Olsen has failed to demonstrate good cause for acceptance of her April 19, 1990 amendment, it will be returned as unacceptable for filing. Furthermore, in light of the possibility that Olsen's original site may constitute a hazard to air navigation, an appropriate air hazard issue will be specified with respect to this applicant and the FAA made a party to the proceeding.

4. *D. E. W.* As originally filed, D.E.W.'s application was 2.68 kilometers short-spaced to first adjacent station WINN(FM), Channel 291B, North Vernon, Indiana. D.E.W. requested a waiver for this short spacing. On April 3, 1990, D.E.W. filed an amendment to its application to specify a non short-spaced site. However, in order for the Commission to accept D.E.W.'s late-filed amendment for good cause, the application must have been acceptable for filing as of the amendment of right date. *See, e.g., Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989).

5. D.E.W.'s application appeared on a Public Notice of Tender on March 3, 1989. Pursuant to 47 C.F.R. § 73.3522(a)(6), the last date for filing amendments of right in this proceeding was April 5, 1989. Thus, D.E.W.'s April 3, 1990 amendment to correct its short-spacing was late-filed. Furthermore, after the close of the amendment as of right period, an applicant cannot file a curative amendment to correct an acceptability defect. To accept amendments after that period would be unfair to the other applicants in this proceeding, all of whom fully complied with our acceptability requirements as of the amendment as of right date. In addition, to allow such perfecting amendments after the above-noted period has

lapsed would undermine the streamlined efficient processing procedures adopted in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), to expedite the authorization of new or expanded FM service to the public. The Commission has stated that where no substantial and material question of fact regarding technical feasibility or availability is raised concerning all other applicants' fully-spaced transmitter sites,[1] waivers of 47 C.F.R. § 73.207 will be denied and the short-spaced application will not be designated for hearing with a short-spacing issue against it. *See Donovan Burke*, 104 FCC 2d 843 (1986). Accordingly, D.E.W.'s waiver request will be denied, its application will be dismissed as unacceptable for filing and the April 3, 1990 amendment will be returned.

6. *Other Matters*. As originally filed, the applications of River and Olsen certified that they did not have sufficient funds to construct their proposed facilities and to operate them for three months without revenue. River stated it would "obtain such committed sources and shall so notify the Commission within the required period." Olsen stated that "financial documentation is being obtained" and that an amendment would be filed "upon receipt." River filed an affirmative financial certification amendment to its application on June 22, 1989 and Olsen an affirmative financial certification amendment to her application on June 6, 1989. River's and Olsen's applications were put on *Public Notice* for acceptance for tender on March 3, 1989 and they, therefore, had until April 5, 1989 to file amendments as a matter of right. After the close of the amendment as of right period, an applicant cannot file a curative amendment to correct a grantability defect. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). To accept amendments after the close of the amendment as of right period would be unfair to the other applicants in this proceeding, who fully complied with Commission rules as of the amendment as of right date. *See Primemedia Broadcasting, Inc.*, 3 FCC Rcd 4293 (1988); *See also, Emmy Hahn Limited Partnership, supra; Domega Broadcasting Corporation*, 4 FCC Rcd 1450 (1989). Accordingly, River's and Olsen's amendments are untimely and will herein be returned. Furthermore, an appropriate issue will be added as to River's and Olsen's financial qualifications.

7. The applicants below have petitioned for leave to amend their application on the dates show. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Hutter	June 13, 1990
Mid-America	December 15, 1989
High Level	January 10, 1990; March 23, 1990; June 25, 1990

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by RamComm and Olsen would constitute a hazard to air navigation.

2. To determine with respect to River and Olsen, whether the applicants are financially qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraphs, 3 and 6, above, Olsen's June 6, 1989 financial and April 19, 1990 engineering amendments ARE RETURNED.

12. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraphs 4 and 5, above, D.E.W.'s request for waiver of 47 C.F.R. § 73.207 IS DENIED, its application IS DISMISSED and its April 3, 1990 amendment IS RETURNED.

13. IT IS FURTHER ORDERED, That pursuant to the discussion in paragraph 6, above, the June 22, 1989 financial amendment of River IS RETURNED as unacceptable for filing.

14. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Hutter, Mid-America and High Level ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] D.E.W.'s request for waiver fails to raise any questions of fact regarding the technical feasibility or availability of sites for the Valley Station allocation. *See North Texas Media*, 778 F.2d 28 (D.C. Cir. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Allnet Communications Services, Inc. On Request for Inspection of Records — FOIA Control No. 90-71

MEMORANDUM OPINION AND ORDER

Adopted: July 26, 1990; Released: July 27, 1990

By the Commission:

1. The Commission has before it an Application for Review filed on behalf of Allnet Communications Services, Inc. (Allnet), appealing an April 17, 1990 Freedom of Information Act (FOIA)[1] decision by the Chief, Common Carrier Bureau. Allnet seeks review of the Bureau's withholding of documents relating to three local exchange carriers mentioned in March 7, 1990 testimony before the House Energy and Commerce Subcommittee on Telecommunications.

2. The Bureau's decision indicated that the following materials were located in response to Allnet's request: (1) portions of Commission audit reports prepared by Commission auditors reviewing attestation audits conducted with respect to two local exchange carriers; (2) an undated outline prepared by staff of the Common Carrier Bureau entitled "Examples of CPA Attestation Audit Findings Resulting in Dollar Adjustments;" (3) portions of a table prepared by a local exchange carrier showing the rate of return analysis for unregulated services during 1988; and (4) workpapers entitled "Reg/Nonreg Analysis, 12/31/88," prepared by an independent auditing company during an attest audit of a local exchange carrier.

3. The Bureau withheld all of the materials listed under the "impairment" prong of FOIA Exemption 4[2] or under Exemption 5. [3] Subsequently, however, the carriers informed the Commission and Allnet that they had no objection to public disclosure of virtually all of the factual information supplied by them that is contained in the identified documents.[4] One carrier requested confidential treatment for portions of the audit report that disclosed the amount the carrier paid to an independent auditor for conducting the attestation audit.[5]

DECISION

4. We agree that disclosure of portions of the audit report pertaining to the auditor's fees is likely to result in substantial competitive harm to both the carrier and the independent auditor.[6] We further note that the requester does not oppose confidentiality for this material. We shall therefore grant the carrier's request for confidential treatment of these materials, pursuant to Exemption 4 of the FOIA. In light of the carriers' consent to disclosure of the remaining factual information supplied by them that is contained in the reports and other records, however, we see no reason to withhold this material.[7] Accordingly, Allnet's arguments addressing these factual materials have been rendered moot.

5. On appeal, the only matter remaining for disposition is Allnet's claim that the Bureau improperly withheld portions of the staff's audit reports under the deliberative process privilege in Exemption 5. The two Commission audit reports at issue were created by Commission staff auditors for the purpose of apprising superiors of the staff's judgments regarding the adequacy of the attest audits performed by independent auditors and to provide recommendations for improving the process.[8] The withheld portions of the reports consist of opinions and recommendations of the staff auditors concerning these matters. Consistent with precedent and the Bureau's decision, we agree that these portions of the audit reports are predecisional and deliberative and are well within the scope of FOIA Exemption 5.

6. Contrary to Allnet's assertions, the fact that there is no "memorialization of the final resolution of these audit reports" does not mean that the audit reports themselves represent final agency decisions and thus are not "predecisional" documents within the scope of Exemption 5. In determining that a document is predecisional, an agency does not have to point to a specific agency decision, but can merely establish that a deliberative process was involved and that the document at issue played a role in the process. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F. 2d at 868; *Schell v. HHS*, 843 F. 2d 933, 941 (6th Cir. 1988) ("When specific advice is provided, . . . it is no less predecisional because it is accepted or rejected in silence, or perhaps simply incorporated into the thinking of superiors for future use"). Therefore, for the reasons indicated, we shall deny access to these deliberative portions of the two audit reports.[9]

7. Accordingly, IT IS ORDERED, that the Application for Review filed by Allnet Communications Services, Inc. is denied to the extent indicated herein.

8. The Requestor may seek judicial review of this decision pursuant to 5 U.S.C. § 552(a)(4)(B).

9. The officials responsible for this action are the following Commissioners: Alfred C. Sikes, Chairman, James H. Quello, Sherrie P. Marshall, Andrew C. Barrett and Ervin S. Duggan.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

The following documents responsive to FOIA Control No. 90-71, filed by Allnet Communications Services, Inc. are being withheld in part:

1. Two Commission audit reports written by staff of the Audits Branch, Common Carrier Bureau, dated December 7, 1989 and January 24, 1990, reviewing attestation audits of two local exchange carriers. Subject: Adequacy of attestation audits and staff recommendations for improving the process. SEGREGABLE FACTUAL POR-

TIONS AVAILABLE FOR INSPECTION, except as indicated herein. Withheld portions consist of (i) opinions, conclusions, and recommendations of Commission staff (withheld under Exemption 5); and (ii) portions of a chart in one report that disclose the fees charged by an independent auditing company for the services rendered to the local exchange carrier (withheld under Exemption 4).

2. A draft (unsent) two-page inter-office memorandum, dated November 13, 1989, from Kenneth P. Moran (Chief, Accounting and Audits Division) to Gerald P. Vaughan (Deputy Chief, Common Carrier Bureau). Subject: October 16, 1989 meeting between Audit Branch staff and local exchange carrier concerning carrier's proposal for refunding overearnings. SEGREGABLE FACTUAL PORTIONS AVAILABLE FOR INSPECTION. Withheld portion consists of information reflecting opinions and recommendations of staff formulated subsequent to the subject meeting (withheld under Exemption 5).

3. A local exchange carrier workpaper dated December 26, 1989 and labeled "Summary of Findings." Subject: Summary of findings of attestation audit conducted by independent auditor. SEGREGABLE PORTIONS AVAILABLE FOR INSPECTION. Withheld portions consists of two handwritten sentences by a Commission staff auditor, reflecting his opinion concerning a particular adjustment made by the carrier (withheld pursuant to Exemption 5).

FOOTNOTES

[1] 5 U.S.C. § 552.

[2] FOIA Exemption 4, 5 U.S.C. § 552(b)(4), permits the withholding of "commercial or financial information obtained from a person and privileged or confidential." Generally, information is confidential "if disclosure . . . . is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." *National Parks Conservation Ass'n v. Morton*, 498 F. 2d 765, 770 (D.C.Cir. 1974) (*National Parks I*).

[3] Exemption 5 of FOIA prevents the disclosure of "inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption has been extended to incorporate certain common law privileges developed in civil discovery cases, including, *inter alia*, the deliberative process privilege. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F. 2d 854 (D.C. Cir. 1980) (en banc). Generally, this privilege protects predecisional documents that are part of the deliberative process of examining agency policy. *Coastal States Gas Corp.*, 617 F. 2d at 868; *Vaughn v. Rosen*, 523 F. 2d 1136, 1143-44 (D.C. Cir. 1975).

[4] Pending disposition of this appeal, the Commission conducted an additional search of its field office and discovered several additional carrier workpapers that are within the scope of this request. Pursuant to sections 0.461 and 0.461(i) of the rules, the carriers were notified that a request had been made for materials that had been submitted by them in confidence. (The carriers had filed written requests for confidential treatment at the time of the materials' submission to the Commission.) Allnet's Director of Public Policy and Government Affairs, who had agreed to a four working day extension of time, until June 25, 1990, was informed by Commission staff on June 22, 1990 and on June 26, 1990 that two of the carriers would contact him shortly to discuss arrangements for inspection of the materials. In light of these developments, the Requester was also advised that it appeared many of the issues raised by his appeal would become moot. Two of the carriers contacted Allnet by June 27, 1990 and one of those had supplied Allnet with all the materials pertaining to it by that date. By June 29, 1990, all of the carriers had notified the Commission in writing that, with minor exceptions, they did not object to disclosure of the factual materials contained in the identified documents.

[5] The carrier also requested confidential treatment for portions of the carrier workpaper identified as item 3 in para. 2, *supra*. On July 3, 1990, Allnet informed the Commission that it would enter into a protective agreement with the carrier for these materials. On July 13, 1990, however, Allnet informed the Commission that it had been unable to reach a confidentiality agreement with the carrier for the carrier workpaper data for unregulated services. Allnet filed an opposition to the request for confidentiality for this document on July 13, 1990, and on July 20, 1990, the carrier supplemented its request for confidentiality for portions of this document. We shall address issues pertaining to this document in a separate order.

[6] The accounting firm that conducted the audit obviously both competes with numerous other accounting firms for the carrier's business and provides service to other firms. Disclosure of the amount it charged the carrier for conducting the audit could give its competitors an unfair advantage by permitting them to offer the same service for less money, or could adversely affect the accounting firm's ability to negotiate with others for the same service. Likewise, the carrier could suffer competitive harm in that it may not be able to obtain the lowest possible bid for auditing services if it is publicly known what it has paid for the services in the past. Thus the pricing information is within the scope of the competitive harm prong. *See, e.g., Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1174 (D.D.C. 1973) (sales information, including pricing data, total net sales, and total costs and expenses, withheld under competitive harm).

[7] The relevant portions of the outline prepared by the Common Carrier Bureau staff, which contains factual information supplied by the carriers, will also be disclosed. Likewise, certain additional responsive documents that were obtained from the carriers or independent auditors, and that were located subsequent to the Bureau's initial search, will be disclosed, except for two sentences handwritten on one document by a Commission staff person, which are within the scope of FOIA Exemption 5. The carriers have indicated that they do not object to public disclosure of the information in these documents. Furthermore, a recently located internal draft Commission memorandum describing a meeting between Commission staff and one local exchange carrier will be disclosed, except to the extent that it contains deliberative material within the scope of Exemption 5.

[8] The Commission requires that LECs submit to annual attest audits by independent auditors as a means of aiding in its cost allocation policies. *See Report and Order*, 2 FCC Rcd 1298 (1987), modified on reconsideration 2 FCC Rcd 6283 (1987), *modified on further recon.*, 3 FCC Rcd 6701 (1988), *aff'd, Southwestern Bell Corp. v. FCC*, 896 F. 2d 1378 (D.C.Cir. 1990).

[9] We are likewise withholding deliberative segments of two other documents, as indicated in note 7, *supra*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for a Low Earth Orbit Mobile-satellite Service	RM-7399

ORDER GRANTING EXTENSION OF TIME

Adopted: August 1, 1990; Released: August 3, 1990

By the Office of Engineering and Technology:

1. STARSYS, Inc. (STARSYS) has requested an extension of time within which to file reply comments in the above referenced proceeding. STARSYS filed a Petition for Rule Making on May 4, 1990, and it was placed on public notice on June 18, 1990. The comment and reply comment dates were set for July 19, 1990 and August 6, 1990, respectively.

2. STARSYS requests an extension of the reply comment date to August 17, 1990 to develop their reply more fully. STARSYS points out that Orbital Communications Corporation (ORBCOMM) challenged the technical feasibility of STARSYS's proposal to operate its low Earth orbit mobile-satellite systems using spread spectrum modulation techniques. STARSYS claims that as the technical issues are complex, it will not be able to respond to ORBCOMM's technical showing in the time allowed for reply comments. Therefore, in order to fully address the ORBCOMM contentions, an extension of the reply period is requested.

3. In view of the foregoing, we find that an extension of the reply comment deadline to August 17 should be sufficient for all interested parties to study and prepare their responses to the petition and, thus, would be in the public interest. Therefore, we are extending the dates for reply comments to *August 17, 1990*.

4. This action is taken pursuant to authority found in Sections 4(i), 302, and 303 of the Communications Act of 1934 as amended, 47 U.S.C. Sections 154(i), 302, 303, and pursuant to Sections 0.31 and 0.241 of the Commission's Rules, 47 C.F.R. Sections 0.31 and 0.241.

FEDERAL COMMUNICATIONS COMMISSION

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Stephen Communications, Inc. File No. 13626-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on E-group Channels at New London, Connecticut

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1990; Released: August 10, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Stephen Communications (Stephen) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the New London, Connecticut area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) and Century Communications Corporation (Century) filed post-lottery Petitions to Deny,[1] challenging the application. Stephen filed a Reply to the Petition to Deny of the Committee.

2. *Pleadings*. In their Petitions, the Committee and Century allege that Stephen, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for New London. The petitioners contend that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill, and the similarities in technical and other information among the applications, and the Letter of Understanding between Stephen and Bruce Merrill[5] should lead the Commission to conclude that Stephen failed to disclose the identity of the real-party-in-interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a). In addition, petitioners allege these same facts demonstrate that Stephen filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Stephen failed to disclose its affiliation or relationship to its intended or likely subscriber, Bruce Merrill, in violation of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900.

3. In its Reply, while it admits that there was cooperation between Stephen and Bruce Merrill in the preparation of Stephen's MMDS applications (Reply at 11), Stephen argues that it has not violated the real-party-in-interest and one-to-a-market rules because no one other than Stephen Merrill owns or controls any interest in Stephen. Reply at 6.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline)*. In the instant case, the petitioners allege the apparent existence of real-party-in-interest rule, one-to-a-market rule, and affiliation disclosure rule violations. After consideration of the petitioners' allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. *Id.*, 857 F.2d at 1563, 1573; *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Proof that Stephen failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. §309(d)(1), we now reach the question of the substantiality[6] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The petitioners' allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[7] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[8] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[9] The petitioners' allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for the "cookie-cutter" applications that were filed.[10] However,"[t]here is no indication in the record that [Bruce] Merrill has any financial interest or reponsibility for any of the applicatons." *VCI*, 2 FCC Rcd at 1898. Stephen asserts that "no one other than Stephen Merrill has ever had an ownership interest in [Stephen]. Furthermore, no one but Stephen Merrill is or will be in a position to actually or potentially control the operation of [Stephen's] proposed MMDS facilities." Reply at 14. We find the petitioners' unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Stephen's rebuttal. *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. The Committee also alleges that Stephen violated the affiliation disclosure provision of Section 21.900 because it failed to submit a statement disclosing the affiliation or relationship between Stephen and Bruce Merrill, an intended or likely subscriber. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974). Stephen argues that there was no need to submit an affiliation statement pursuant to Section 21.900 because his relationship with Bruce Merrill is not financial or business related. We note that at the time Stephen initially filed its application, the application included a copy of the Letter of Understanding between Stephen and Bruce Merrill. Therefore, there is no issue here of non-disclosure of the fact that Bruce Merrill would be the intended or likely subscriber for Stephen's MMDS station in New London. Therefore, we find that there is no substantial or material question of fact which requires an evidentiary hearing with regard to violation of the affiliation disclosure provisions of Section 21.900.

9. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Stephen "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." *See* 47 U.S.C. § 202(a); *see also* 47 U.S.C. § 201. Stephen is reminded that the Commission imposed in that order a condition on any MMDS authorization Stephen obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During that 60 day period, [Stephen] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

10. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee and Century, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petitions to deny filed by the petitioners are denied.

11. *Ordering Clause.* Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries and Century Communications Corporation ARE HEREBY DENIED. This order is issued pursuant Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. §1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI*).

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill instigated Stephen's MMDS application submission. Committee Petition at 7, n. 14.

[4] Bruce Merrill is the father of Stephen Merrill, the president and 100% stockholder of Stephen Communications, Inc.

[5] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, will provide programming services to Stephen, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

[6] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[7] The petitioners argue that Bruce Merrill, through his company, Merrill Communications, as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in New London. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[8] Section 21.13(a) of the Commission's Rules, 47 C.F.R. §21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[9] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may

submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[10] We note that the petitioners failed to submit an affidavit to support their allegations pursuant to 47 C.F.R. § 309(d)(1). And, these petitioners did not provide the amount of specific facts to substantiate their allegations as required in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Presco Corporation — File No. 12028-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on F-group Channels at Nashville, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1990; Released: August 10, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Presco Corporation (Presco) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels to serve the Nashville, Tennessee area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) filed a post-lottery Petition to Deny,[1] challenging the application. Presco filed a Reply to the Petition to Deny.

2. *Pleadings*. In its Petition, the Committee alleges that Presco, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Nashville. The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill, and the similarities in technical and other information among the applications, and the Letter of Understanding between Presco and Bruce Merrill,[4] should lead the Commission to conclude that Presco failed to disclose the identity of the real-party-in-interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), and filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule.

3. In its Reply, Presco relies upon the sworn affidavit of its president, O. Leonard Press, to support its assertion that it has not violated the real-party-in-interest and one-to-a-market rules. Presco argues that "[t]he mere fact that [Bruce Merrill] failed to charge Mr. Press some nominal fee for assisting in the preparation of Presco's application should not render [Bruce Merrill's] assistance illegitimate under the Commission's Rules." Presco's Reply at 5.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont*); *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz*).

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988)(hereinafter cited as *Astroline*). In the instant case, the Committee alleges the apparent existence of real-party-in-interest rule and one-to-the-market rule violations. After consideration of the Committee's allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Presco failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *Astroline*, 857 F.2d at 1563, 1573; *see, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petition to deny comports with the requirements enunciated at 47 U.S.C. §309(d)(1), we now reach the question of the substantiality[5] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The Committee's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[6] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[7] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[8] The Committee's allegations of

rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were filed. However, "[t]here is no indication in the record that [Bruce] Merrill has any financial interest or reponsibility for any of the applications." *VCI*, 2 FCC Rcd at 1898. In its Reply, Presco states in rebuttal: "There are no agreements, covert or overt, which would give any person or entity any ownership or control in or over Presco." Presco Reply at 7, Affidavit of O. Leonard Press. We find the Committee's unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Presco's rebuttal. *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the Committee's allegations, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petition to deny filed by the Committee will be denied.

9. In *VCI*, 2 FCC RCD at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Presco "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." Presco is reminded that the Commission imposed in that order a condition on any MMDS authorization Presco obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During the 60 day period, [Presco] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

10. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petition to Deny filed by The Committee for Fair MDS Lotteries IS HEREBY DENIED. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI*).

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Stephen Communications, Inc., Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, and Wireless Services, Inc.

[3] The Committee asserts that Marshall M. Carpenter, Jr., as an employee of Bruce Merrill, instigated Presco's MMDS application submission.

[4] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications (MerrillCom), will provide programming services to Presco, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

[5] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[6] The Committee argues that Bruce Merrill, through his company, MerrillCom, as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Nashville. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[7] Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[8] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Application of

Stephen Communications, Inc. — File No. 13675-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on E-group Channels at Stockton, California

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1990; Released: August 10, 1990

By the Chief, Domestic Facilities Division:

1. *Introduction*. The above-referenced application of Stephen Communications (Stephen) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Stockton, California area was selected for qualification review as the result of a Commission lottery. The Committee for Fair MDS Lotteries (Committee) and Continental Cablevision of California, Inc. (Continental) filed post-lottery Petitions to Deny,[1] challenging the application. Stephen filed a Reply to the Petition to Deny of the Committee.

2. *Pleadings*. In their Petitions, the Committee and Continental allege that Stephen, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Stockton. The petitioners contend that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill, and the similarities in technical and other information among the applications, and the Letter of Understanding between Stephen and Bruce Merrill[5] should lead the Commission to conclude that Stephen failed to disclose the identity of the real-party-in-interest to its application in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. § 21.13(a). In addition, petitioners allege these same facts demonstrate that Stephen filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. § 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Stephen failed to disclose its affiliation or relationship to its intended or likely subscriber, Bruce Merrill, in violation of Section 21.900 of the Commission's Rules, 47 C.F.R. § 21.900.

3. In its Reply, Stephen argues that it has not violated the real-party-in-interest and one-to-a-market rules because no one other than Stephen Merrill owns or controls any interest in Stephen. Reply at 6.

4. *Discussion*. The Court of Appeals for the District of Columbia Circuit in a recent line of cases clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C.Cir. 1988)(hereinafter cited as *Beaumont)*; *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C.Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. § 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985)(hereinafter cited as *Jazz)*.

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limited to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C.Cir. 1988). In the instant case, the petitioners allege the apparent existence of real-party-in-interest rule, one-to-a-market rule, and affiliation disclosure rule violations. After consideration of the petitioners' allegations, as required under 47 U.S.C. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject application would be *prima facie* inconsistent with the public interest, convenience and necessity. Proof that Stephen failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *Id.* at 1563, 1573; *see David Lausisen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car.Bur. 1988); *see, e.g., KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C.Cir. 1986), *cert. denied*, 107 S.Ct. 2182 (1987); *Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. §309(d)(1), we now reach the question of the substantiality[6] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The petitioners' allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[7] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[8] is whether that person has an ownership interest, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008

(1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[9] The petitioners' allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were filed.[10] However,"[t]here is no indication in the record that [Bruce] Merrill has any financial interest or reponsibility for any of the applicatons." *VCI*, 2 FCC Rcd at 1898. Stephen asserts that "no one other than Stephen Merrill has ever had an ownership interest in [Stephen]. Furthermore, no one but Stephen Merrill is or will be in a position to actually or potentially control the operation of [Stephen's] proposed MMDS facilities." Reply at 14. We find the petitioners' unsubstantiated evidence insufficient to establish the existence of a real-party-in-interest violation or a one-to-the-market rule violation in light of Stephen's rebuttal. *VCI*, 2 FCC Rcd 1895 (1987); *Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. The Committee also alleges that Stephen violated the affiliation disclosure provision of Section 21.900 because it failed to submit a statement disclosing the affiliation or relationship between Stephen and Bruce Merrill as an intended or likely subscriber. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service*, 45 FCC 2d 616, 618 (1974). Stephen argues that there was no need to submit an affiliation statement pursuant to Section 21.900 because his relationship with Bruce Merrill is not financial or business related, but is familial. We note that at the time Stephen initially filed its application, the application included a copy of the Letter of Understanding between Stephen and Bruce Merrill. Therefore, there is no issue here of non-disclosure of the fact that Bruce Merrill would be the intended or likely subscriber for Stephen's MMDS station in Stockton. Thus, we find that there is no substantial or material question of fact which requires an evidentiary hearing with regard to violation of the affiliation disclosure provisions of Section 21.900.

9. In *VCI*, 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Stephen "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." *See* 47 U.S.C. § 202(a); *see* also 47 U.S.C. § 201. Stephen is reminded that the Commission imposed in that order a condition on any MMDS authorization Stephen obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During that 60 day period, [Stephen] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

10. Having carefully considered all the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee and Continental, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, the petitions to deny are denied.

11. *Ordering Clause*. Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries and Continental Cablevision of California Inc. ARE HEREBY DENIED. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its Petition to Deny, the Committee incorporated by reference the pleadings it filed in *Virginia Communications, Inc.*, 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI*).

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Video/Multipoint, Inc., Virginia Communications, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill instigated Stephen's MMDS application submission. Committee Petition at 7, n. 14.

[4] Bruce Merrill is the father of Stephen Merrill, the president and 100% stockholder of Stephen Communications, Inc.

[5] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, will provide programming services to Stephen, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

[6] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[7] The petitioners argue that Bruce Merrill as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Stockton. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[8] Section 21.13(a) of the Commission's Rules, 47 C.F.R. §21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[9] Section 21.901(d)(2) provides:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding

more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[10] We note that the petitioners failed to submit an affidavit to support their allegations pursuant to 47 C.F.R. § 309(d)(1). And, these petitioners did not provide the amount of specific facts to substantiate their allegations as supplied by Astroline in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-356

In the Matter of

Amendment of the Amateur Radio Service Rules to Make the Amateur Service More Accessible to Persons with Handicaps.

NOTICE OF PROPOSED RULE MAKING

Adopted: August 1, 1990; Released: August 9, 1990

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making* (*Notice*), we propose on our own motion to make the amateur service more accessible to persons who, because of their handicaps, have extraordinary difficulty in passing Morse code telegraphy examinations for amateur operator licenses. For those amateur operator licensees who, because of severe handicaps, are incapable of passing the higher speed telegraphy examinations, we propose to amend Sections 97.3, 97.505, and 97.511 of the Commission's Rules, 47 C.F.R. §§ 97.3, 97.505, and 97.511, to exempt them from these examinations.

II. BACKGROUND

2. The amateur service is open to qualified persons of all ages who are interested in radio technique solely with a personal aim and without pecuniary interest. It provides individuals an opportunity for self-training, intercommunication and technical investigation. To qualify for an operator license an applicant must pass written and telegraphy examinations.[1] The degree of skill and knowledge the examinee can demonstrate to the administering volunteer examiners (VEs) determines the class of operator license for which the person is qualified.

3. A telegraphy examination requires the examinee to prove the ability to send correctly by hand and receive correctly by ear text in Morse code signals.[2] The administration of the examination requires the examinee to listen to an audible Morse code message sent at the required speed, usually by a paper or magnetic tape player or personal computer. Then the examinee must correctly interpret the message. Although Section 97.509 prescribes that the VEs accommodate an examinee whose handicaps require a special examination procedure, until recently the telegraphy test messages were sent in the same manner to all examinees, including those who required special procedures. [3]

III. DISCUSSION

4. To make all classes of amateur operator licenses accessible to persons who, because of their handicaps, cannot pass the required telegraphy examinations, the volunteer-examiner coordinators (VECs), in response to our request, have expanded the special procedures the VEs make to accommodate handicapped individuals.[4] There remain, however, otherwise qualified licensees who, because of their severe handicaps, cannot pass the higher speed examinations even when special accommodation procedures are used.[5] To assist such individuals, we propose to exempt from these examinations individuals holding current, or renewable,[6] Novice, Technician, General, or Advanced Class operator licenses.[7]

5. Administratively, the exemption provision would be incorporated into the existing VEC system. All applicants for a new General, Advanced, or Amateur Extra Class of operator license must present completed FCC Form 610 application documents to the VEs prior to examination. They also must show to the VEs the documents for which they claim examination element credit.[8] Under the proposed rules, the VEs would give examination credit to severely handicapped licensees seeking exemption from the element 1(B) thirteen wpm or the element 1(C) twenty wpm telegraphy examinations.[9] The examinees would also be required to show an authentic certification from a physician attesting that they cannot pass these examinations because of severe handicaps. If the examinee successfully completes the written examination, the application document together with the physician's certification would be submitted to the VEC for screening and forwarding to our Gettysburg office. For the Morse code examination element credit, the application documents would be reviewed by the Commission and a license would be issued if we find them to be in order.

6. For the purposes of these proposed rules, we define a physician as a person who is currently licensed to practice in a place where the amateur service is regulated by the Commission,[10] as either a Doctor of Medicine (M.D.) or as a Doctor of Osteopathy (D.O.). We want to emphasize that VEs and VECs would not make medical judgments about the severity, effect, or duration of a handicap. Their role in this process would be confined to assuring that the certifications appear not to be fraudulent and meet the requirements of the Rules. To assist them in this task, we propose that the certification, in addition to having the physician's signature, contain the physician's name, address, and office telephone number.

7. In accordance with the Rehabilitation Act of 1973, as amended,[11] we propose to define the term "severely handicapped individual" to mean a person who has a severe physical or mental disability which seriously limits one or more functional capacities (such as mobility, communication, self-care, self direction, interpersonal skills, work tolerance, or work skills) in terms of employability; whose vocational rehabilitation can be expected to require multiple vocational rehabilitation services over an extended period of time; and who has one or more physical or mental disabilities resulting from amputation, arthritis, autism, blindness, burn injury, cancer, cerebral palsy, cystic fibrosis, deafness, head injury, heart disease, hemiplegia, hemophilia, respiratory or pulmonary dysfunction, mental retardation, mental illness, multiple sclerosis, muscular dystrophy, musculo-skeletal disorders, neurological disorders (including stoke and epilepsy), paraplegia, quadriplegia, and other spinal cord conditions, sickle cell

anemia, specific learning disability, end-stage renal disease, or other disability or combination of disabilities determined on the basis of an evaluation of rehabilitation potential to cause comparable substantial functional limitation.[12] We invite comments with respect to this aspect of the proposal.

IV. CONCLUSION

8. Because of handicaps that prevented them from mastering Morse code telegraphy, many otherwise qualified persons may have been barred from enjoying the privileges associated with the higher classes of amateur operator licenses. We believe that it is in the public interest to make the amateur service more accessible to individuals with handicaps. Expanding the special accommodations that VEs make when administering any telegraphy examination to handicapped persons combined with our exemptions for severely handicapped licensees from the higher speed telegraphy examinations will further that objective. Accordingly, we invite comments on the proposed amendments to Part 97, as set forth in the attached Appendix.

9. Further, as noted above, to make all classes of amateur operator licenses accessible to handicapped persons, the VEs administer the examinations using special accommodation procedures, as warranted. We also request comments addressing whether these procedures provide sufficient accommodation for severely handicapped persons seeking to pass the minimum speed 5 wpm examination. If not, what improvements in the special procedures or changes in our rules are recommended to accommodate adequately these persons, while still satisfying the Morse code requirements of the international Radio Regulations?

V. PROCEDURAL MATTERS

10. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

11. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

12. Any person who is making an oral *ex parte* presentation and presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

13. Authority for issuance of this *Notice* is contained in Sections 4(i), and 303(l)(1) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(l)(1) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **September 24, 1990**, and reply comments on or before **October 9, 1990**. Extensions of time are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments and reply comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments must state the proceeding to which they relate (PR Docket Number). They should be sent to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street N.W., Washington, D.C. 20554.

14. In accordance with Section 605 of the Regulatory Flexibility Act of 1980, 5. U.S.C. § 605, the Commission certifies that these rule changes would not, if promulgated, have a significant economic impact on a substantial number of small entities. The Amateur Radio Service may not be used to transmit any communication to facilitate the business or commercial affairs of any party. *See* 47 C.F.R. § 97.113(a).

15. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to impose a new information collection requirement on the public. Burden hours on the public will also be increased. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

16. A copy of this *Notice* will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 97 continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. § 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 301-609, unless otherwise noted.

2. Section 97.3 is amended by adding new paragraph (a)(29) and redesignating present paragraph (a)(29) through (a)(40) as (a)(30) through (a)(41):

§ 97.3 Definitions.

(a) The definitions of terms used in Part 97 are:

* * * * *

(29) *Physician*. For the purpose of this Part, a person who is licensed to practice in a place where the amateur service is regulated by the FCC, as either a Doctor of Medicine (M.D.) or a Doctor of Osteopathy (D.O.).

3. Section 97.505 is amended by adding paragraph (a)(5), as follows:

§ 97.505 Element credit.

(a) The administering VEs must give credit as specified below to an examinee holding any of the following documents:

* * * * *

(5) A current, or expired but within the grace period for renewal, Novice, Technician, General, or Advanced Class operator license and a physician's written statement over his or her signature certifying that because the person is an individual with a severe handicap, as defined at 29 U.S.C. § 706(15)(A), the person is unable to pass a 13 or 20 words-per-minute telegraphy examination. In addition, the certification must contain the physician's name, address, and office telephone number, either typed or printed: Element 1(C).

* * * * *

4. Section 97.511 is amended by adding a sentence to paragraph (f). As amended, paragraph (f) reads as follows:

§ 97.511 Technician, General, Advanced and Amateur Extra Class operator license examination.

* * * * *

(f) Within 10 days of the administration of a successful examination for the Technician, General, Advanced or Amateur Extra Class operator license, the administering VEs must submit the application to the coordinating VEC. If telegraphy element credit is claimed under Section 97.505 (a)(5), the physician's written statement must be attached to the application.

FOOTNOTES

[1] The required telegraphy speed for the Novice and Technician Classes of operator license is 5 words per minute (wpm). For the General and Advanced Classes, it is 13 wpm. For the Amateur Extra Class, it is 20 wpm. *See* Sections 97.501 and 97.503 of the Commission's Rules, 47 C.F.R. §§ 97.501 and 97.503.

[2] Section 97.509 of the Commission's Rules, 47 C.F.R. § 97.509 provides that passing a telegraphy receiving examination is adequate proof of an examinee's ability to both send and receive telegraphy.

[3] For example, the special procedures allow the use of a vibrating surface or a flashing light in place of audible telegraphy signals.

[4] The special procedures now include, as warranted, suitable pauses in sending the message after each sentence, each phrase, each word, or even each character to allow the examinee additional time to absorb and interpret what was sent. Where warranted, a sending test is substituted for a receiving test. Section 97.509(h) already provides for these expanded special procedures.

[5] In the Notice of Proposed Rule Making in PR Docket 90-55, we have proposed to to establish a new entry class of amateur operator license that would not require passing a telegraphy examination. The privileges of the proposed new Communicator Class would be 1.25 meters and above. *See* 5 FCC Rcd 880 (1990). If adopted as proposed, that proceeding would make the amateur service more accessible to individuals, handicapped or otherwise, who find learning the Morse code a barrier to their participation in the amateur service.

[6] Application for renewal of an expired amateur service license may be made during a grace period of two years after the expiration date. *See* Section 97.19(c) of the Commission's Rules, 47 C.F.R. § 97.19(c).

[7] The exemption provision of our proposal encompasses only amateur operator licensees because these individuals have passed either the 5 wpm or 13 wpm telegraphy examination. The international Radio Regulations No. 2735 (Geneva, 1979) require that all persons seeking a license to operate an amateur station transmitting below 30 MHz prove that they are able to send correctly by hand and receive correctly by ear texts in Morse code signals.

[8] *See* Section 97.505 of the Commission's Rules, 47 C.F.R. § 97.505 for a listing of the documents for which examination element credit must be given.

[9] Severely handicapped applicants not holding a current license, however, would be required to pass at least the 5 wpm element 1(A). The VEs must make any necessary accommodation as noted in para. 4, *supra*.

[10] *See* Part 97 Appendix 1, *Places where the amateur service is regulated by the FCC*, 47 C.F.R. § Part 97 Appendix 1.

[11] *See also* the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990), whose purpose, *inter alia*, is to provide a comprehensive national mandate for the elimination of discrimination against individuals with disabilities.

[12] *See* 29 U.S.C. § 706(15)(A).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Applications of Certain
Broadcast Stations
Serving Communities in the
Miami, Florida Area

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: June 13, 1990; Released: August 10, 1990

By the Commission: Commissioner Quello concurring in the result; Commissioner Marshall not participating with respect to Station WNWS(AM)/WKYF(FM), Miami, Florida.

1. The Commission has before it (i) a "Petition to Deny" filed January 3, 1989, by the National Black Media Coalition, the Florida State Conference of Branches of the NAACP, and various local branches of the NAACP (hereafter collectively referred to as "NAACP/NBMC") against renewal applications filed by stations licensed to communities in the State of Florida; (ii) a "Petition to Deny" filed by the National Hispanic Media Coalition and the Spanish American League Against Discrimination (hereafter collectively referred to as "NHMC/SALAD");[1] (iii) oppositions filed by the licensees; (iv) the licensees' responses to staff letters of inquiry; and (v) the petitioners' comments on the licensees' responses. Petitioners allege that the challenged stations violated the Commission's EEO rules and policies. Accordingly, they request that we investigate the stations' employment practices and designate the renewal applications for hearing. This Memorandum Opinion and Order and Notice of Apparent Liability (Order) will discuss petitioners' allegations regarding some of the petitioned stations. Other stations will be included in future Orders.[2]

2. *PROCEDURAL MATTERS.* In challenging an application pursuant to Section 309 (d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309 (d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T. V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309 (d)(1).

3. The licensees of WMMK(FM) and WLVU/WLVU(FM) challenge NAACP/NBMC's standing to file the petition. The licensee of WMMK contends that the form declarations filed by the local chapters of the NAACP are insufficient to establish standing and notes that neither WMMK nor the licensee is specifically mentioned in any of the statements accompanying the petition. Initially, we note that the declarations filed by the NAACP contain information sufficient to establish organizational standing for purposes of filing a petition. *American Legal Foundation v. FCC*, 808 F.2d 84 (1987). Nonetheless, NAACP/NBMC did not file its declaration regarding WMMK with the petition but instead filed it on February 21, 1989, forty-nine days late, without providing cause for its untimeliness. In *Florida Broadcast Renewals*, 3 FCC Rcd 1923 (1988), we stated that failure to comply with our procedural rules would not be countenanced. Accordingly, we will treat NAACP as an informal objector with respect to WMMK(FM).

4. The licensee of WLVU/WLVU(FM) contends that NAACP/NBMC lacks standing because the signatory of the affidavit submitted by NAACP regarding its stations lives outside of the stations' service area. NAACP submits a declaration under penalty of perjury from Whitfield Jenkins, President of the Marion County Branch of the NAACP, Leesburg, Florida, who states that he is a listener of the stations. In evaluating a petition to deny the renewal of a broadcast license, the Commission proceeds "on the assumption that the specific facts set forth [in the petition] are true." *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). Because the licensee does not present evidence that the signatory is not a listener of WLVU/WLVU(FM), we find that NAACP has standing regarding those stations.

5. Next, we note that NBMC submitted a timely statement from Pluria Marshall, Chairman of the NBMC. Mr. Marshall is, however, a resident of the Washington, D.C. metropolitan area. The Commission has previously held that statements of Mr. Marshall, who is a member of NBMC but does not claim to be a listener or a resident of the service area of the challenged stations, does not satisfy the requirements of the Act. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad.Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, NBMC lacks standing to petition any of the stations in question. We will treat its pleading against the challenged stations as an informal objection.

6. Finally, NHMC/SALAD timely filed a joint "Petition to Deny" against WNWS/WLYF(FM) accompanied by the affidavit of Osvaldo N. Soto, a resident of the stations' service area. While Mr. Soto's affidavit states that he is Chairman of SALAD, it indicates that he is not a member of NHMC but has applied for admission. To establish associational standing, an organization must submit the statement of one of its members who would otherwise have standing to sue in his or her individual capacity. *See American Legal Foundation, supra*, at 89; *Petition for Rule Making to Establish Standards for Determining the Standing of a Party to Petition to Deny a Broadcast Application*, 82 FCC 2d 89, 96 (1980) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). Accordingly, we will treat SALAD as a petitioner but NHMC as an informal objector.

7. *PLEADINGS.* Petitioners charge that the EEO record of each station reveals that the licensee has not complied with the Commission's EEO Rule, 47 C.F.R. Section 73.2080. Petitioners contend that each of the stations hired few, if any, minorities throughout their respective license terms, failed to have meaningful EEO programs, and failed to recognize or propose steps to correct deficiencies. Petitioners therefore request that the Commission investigate the EEO policies of the challenged stations pursuant to *Bilingual Bicultural Coalition on the*

Mass Media, Inc. v. FCC, 596 F. 2d 621 (D.C. Cir. 1978) (*Bilingual*). Petitioners allege that each application should be designated for an evidentiary hearing and subsequently denied.

8. The licensees maintain that petitioners have failed to present evidence of noncompliance with the Commission's Rules or policies sufficient to warrant inquiry. They therefore request unconditional renewal of their licenses.

9. *DISCUSSION*. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee. 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

10. When the renewal application indicates an adequate record of EEO efforts, it is granted, if otherwise appropriate. If the application indicates an inadequate record of EEO efforts, the Commission may impose a variety of sanctions and remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full term, monetary forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that grant of the application would be consistent with the public interest, we may designate the application for hearing if the facts so warrant. 47 U.S.C. Section 309 (e); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO Report and Order), petition for reconsideration pending*; *see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*); *Bilingual, supra*.

11. Review of each licensee's EEO record leads us to conclude that petitioners have presented a *prima facie* case against each challenged station, so that unconditional grant of the applications for renewal would be inconsistent with the public interest. *Astroline, supra*. Each station's records evidenced an EEO program which reflected inadequate EEO efforts. [3] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP v. FCC, supra*; *Bilingual - Bicultural Coalition, supra*.

12. Upon analysis of each licensee's opposition and response to our inquiry, we conclude that no substantial and material questions of fact remain so as to indicate that any of the licensees discriminated. *Astroline, supra*. Accordingly, designation for hearing is not warranted for any of the stations covered by this Order. While we find that grant of the renewal applications will serve the public interest, we will impose sanctions and prospective remedies as detailed herein.

WNWS/WLYF (FM), Miami

13. In response to our letter of inquiry, the licensee indicated that it had 56 overall and 40 upper-level hiring opportunities from October 1985 until October 1, 1988. The recruitment sources contacted for some of these positions included the *Miami Herald, El Nuevo*, Miami Norland Senior High School, the University of Miami, Barry College, Miami Dade Community College, Miami Lakes Technical College, Florida International University, Lindsley Hopkins Educational Center, Bauder College, the Urban League, the National Organization for Women, the Latin Chamber of Commerce, American Women in Radio and TV, Overtown Response Center and Jobs Program, the Cuban Women's Club, the Coalition of Hispanic American Women, and the National Black Media Coalition.[4] The licensee was able to provide applicant pool information for only 14 of the 56 full-time hires.[5] Twenty-one of the 56 overall hirees were minorities (19 Hispanics, two Blacks), as were nine of the 40 upper-level hirees (eight Hispanics, one Black).[6]

14. NHMC/SALAD alleges, based on statistical disparity, that the licensee engaged in intentional discrimination against Hispanics. NHMC/SALAD also assert that the Hispanic population of the Miami area has increased significantly since the 1980 census. NBMC/NAACP argue that licensee discriminated against minority males. They note that the stations employed no males out of 11 minorities in 1988 and only one male out of 12 minorities in 1987. The licensee responds that specific minority groups should be considered only when that group constitutes virtually all of the minorities in the relevant MSA. As a result, the licensee contends, the Commission should consider its employment of minorities overall rather than its employment of individual minority groups.

15. Because Blacks and Hispanics each constitute substantial portions of the Miami labor force (15.3% and 37.8%, respectively), both groups are entitled to individual review. Nonetheless, failing to meet the Commission's processing guidelines does not in and of itself demonstrate the inadequacy of a licensee's EEO efforts. *See, e.g., Catawba Valley Broadcasting Co.*, 3 FCC Rcd 1913, 1913 (1988) (the guidelines are not quotas which, if not attained, warrant Commission sanction). The Commission instead focuses on a station's overall efforts to recruit, hire, and promote minorities.

16. Moreover, the Court of Appeals has held that a statistical disparity, in the absence of a languishing EEO program, is not sufficient to substantiate an allegation of intentional discrimination. *Bilingual, supra*, at 629. Accordingly, we find that NHMC/SALAD do not allege facts sufficient to support its claim of intentional discrimination against Hispanics. Nor have NAACP/NBMC substantiated its claim of discrimination against minority males.

17. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. Nor do we believe that other sanctions or remedies are necessary. The licensee of WNWS/WLVU appears to have made consistent efforts to recruit minorities, and in fact attracted and hired some minority applicants during the license term. Because we find that the licensee has generally complied with our EEO Rule, we will grant renewal without further action. We admonish the licensee, however, to retain more adequate records of its future EEO efforts.

WMMZ (FM), Ocala

18. In response to our letter of inquiry, the licensee indicated that it had 32 overall and 31 upper-level full-time hiring opportunities from July 1986 through October 1988.[7] The recruitment sources contacted for some of these positions included the *Orlando Sentinel*, *Broadcasting* (trade publication), the *Florida Times-Union*, *Radio and Records*, the *Ocala Star-Banner*, the *Gainesville Sun*, *Ad Week*, the *Daily Commercial*, on-air advertisements, Central Florida Community College, the University of Florida, Brown Institute, Bauder College, NAB Employment Clearing, National Broadcast Talent, and Florida Employment Service. The licensee also contacted employment agencies and participated in employment seminars.[8] The information submitted by the licensee indicates that 26 of the 119 interviewees for the 32 vacancies were minorities. One of the 32 hirees was a minority, a Hispanic female reporter[9] who was recruited from the station's former AM affiliate.[10] In addition, a Black female receptionist was on the station's staff when the licensee acquired the station and was promoted to office manager in June 1988. The licensee also notes that it hired a Black female newscaster in January 1989 before the license term expired, but after the renewal application and petition to deny were filed.

19. NAACP/NBMC submit that WMMZ contacted no sources likely to refer minority applicants during the license term and that the station has employed no minorities in upper-level positions since it acquired the station. The licensee states that because it believed that only local organizations qualified as recruitment sources, it did not seek referrals from minority organizations because there are none in Ocala. The licensee asserts, however, that it has used sources outside of Ocala likely to attract minorities in its recent hiring efforts.[11]

20. Based on the fact that the licensee did in fact attract and hire some minority applicants, we find no substantial and material question of fact to warrant a hearing. We find the EEO record of this licensee comparable to that of the licensee of KVII-TV as set out in *Application of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685 (1989) (*KVII*). In *KVII*, we granted renewal subject to reporting conditions where the licensee's only apparent attempt to recruit minorities was contact with the NAACP during the last year of the license term. We found that KVII did not assess its EEO efforts until the end of the license term. During the last two years of the license term, KVII hired two minorities of 17 hiring opportunities in an area which is 13.5% minority.

21. Similarly, WMMZ evidences limited effort to attract minorities and does not appear to have evaluated its EEO program until the end of the license term. For example, although the licensee attracted 26 minority interviewees for 32 positions from general sources, it does not know whether any of the interviewees were Black, the dominant minority in the labor force. In addition, during the last two years of the license term, WMMZ hired no Blacks out of 32 hiring opportunities. Given all of the above, it does not appear that WMMZ either made specific efforts to recruit Blacks or was in a position to self assess the effectiveness of its program. Accordingly, while we find that granting the licensee's application for renewal will serve the public interest, we also find it appropriate to impose reporting conditions to monitor future performance.

WQAM/WKIS (FM), Miami/Boca Raton

22. In response to our letter of inquiry, the licensee indicated that it had 78 overall and 56 upper-level full-time hiring opportunities from February 1985[12] through October 1, 1988. The recruitment sources contacted for some of these positions included the *Fort Lauderdale News & Sun Sentinel*, the *Hollywood Sun-Tattler*, the *Miami Herald*, *Radio and Records*, Brown Institute, Northeast Broadcasting, Sheridan Vocational, FIU, the University of Miami, Miami Lakes Technical Education Center, Bauder College, the Black Media Coalition, the NAACP, and Jobs for Miami.[13] The licensee did not track the number, gender, race, and recruitment sources of interviews for each position but notes that it has recently begun to do so. Of the 78 overall hirees, two were Black and five were Hispanic.[14]

23. NAACP/NBMC submit that although the stations claim to use several minority-oriented recruitment sources, no minorities were referred by any of those sources during the renewal year.[15] The licensee responds that it has made consistent and successful efforts to recruit, hire, and promote minorities. The licensee notes that it has received minority referrals from existing employees and a local newspaper. A declaration accompanying the licensee's opposition states that "[a]lthough we have no explanation for why educational institutions and minority and women's organizations in the Miami area were not receptive to our notices of job openings . . . it is a fact that WKIS/WQAM are receiving an adequate number of minority candidates for jobs as they occur."[16]

24. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The licensee's record indicates some effort to recruit minorities, and the licensee did in fact hire minorities in both upper-level and lower-level positions. The licensee did not, however, retain applicant information until after the license term expired. Such records are essential to effective self-assessment. We find this case similar to cases in which we have granted renewals subject to reporting conditions. *See, e.g., Application of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988); *Applications of Certain Broadcast Stations Serving Communities in Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *Application of Greater New Orleans Educational Television Foundation*, 3 FCC Rcd 1923 (1988); *Station WFBR*, 3 FCC Rcd 5913 (1988). In those cases, reporting conditions were ordered because we determined, *inter alia*, that the licensees generally did not maintain records sufficient to achieve self-assessment of the effectiveness of their EEO programs. Accordingly, while we find that granting the licensee's application for renewal will serve the public interest, we also find it appropriate to impose reporting conditions to monitor future performance.

WOLL (FM), Riviera Beach [17]

25. In response to our letter of inquiry, the licensee indicated that it had 44 overall and 34 upper-level full-time hiring opportunities between October 1, 1984 and October 1, 1988.[18] The recruitment sources contacted for some of these positions included the *Palm Beach Post*, the *Fort Lauderdale News & Sun Sentinel*, Florida Atlantic University, Palm Beach Junior College, Florida A & M University, the Northwood Institute, the NAACP, the Urban League, the Community Action Council, and Westboro Business and Professional Women's Club. The licensee states that it believes that advertisements were

placed in *Broadcasting* and *Radio and Records* for all on-air positions, although it is unable to document these contacts.[19] The licensee did not keep track of the recruitment sources of the successful candidates, nor did it retain records regarding the number, race, gender, and recruitment sources of interviewees. The licensee states that such records most likely had been retained but were probably lost when the station changed general managers in the fall of 1988. The licensee also notes that it had little success in its attempts to contact former employees who could supply the missing information.[20] Of the 44 overall hirees, two were Black. None of the 34 upper-level hirees was a minority.[21]

26. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The licensee engaged in some recruiting of minorities. We find, however, that WOLL(FM)'s EEO record is similar to that of the licensee in *Stations WLIT /WYAV-FM, Conway, SC*, 4 FCC Rcd 5214 (1989) (*WLIT/WLAV*). In *WLIT /WYAV*, we imposed reporting conditions and $3000 forfeiture where the licensee maintained limited documentation of recruitment efforts but stated that it affirmatively recruited for 16 of 36 full-time positions during the license term in an area which is 19.4% minority (17.9% Black). Only one of those 16 applicant pools included Blacks. Three of the 36 hirees were Black, all hired two weeks prior to the licensee's filing of its renewal application. Like WLIT/WLAV, WOLL did not retain records essential to effective self-assessment. For example, the extent to which Blacks were recruited and included in the 44 applicant pools is unclear from the licensee's records. Of those 44 hirees, two were minorities, both Black, in an area which is 20.2% minority (13.8% Black). Accordingly, while we find that granting the application for renewal of license will serve the public interest, we also find it appropriate to impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $3.000.

WPFM (FM), Panama City

27. In response to our letter of inquiry, the licensee indicated that it had 29 overall and 22 upper-level full-time hiring opportunities from November 1983, when it acquired the station, through October 1, 1988.[22] The recruitment sources contacted for some of these positions included the *Panama City News Herald*, Gulf Coast Community College, the Pilot Club of Panama City, the Florida State Employment Office, and the Women's Club of Panama City.[23] The licensee also advertised on-air and solicited referrals from existing employees. During the license term, the licensee's contacts with its recruitment sources were not predicated on a specific job vacancy. The licensee also did not retain interviewee information for each position and does not appear to have assessed its EEO program until the end of the license term. Lastly, we note that two of the 29 new hires were Blacks hired for lower-level positions, and one was an American Indian hired for an upper-level position.

28. We find WPFM(FM)'s record similar to that of the licensee in *Stations WOOJ/WOOJ-FM*, 4 FCC Rcd 6178 (1989) (*WOOJ*). In *WOOJ*, the licensee failed to recruit minorities as vacancies occurred. Until the end of the license term, WOOJ's recruitment efforts were limited to an annual mass mailing which did not list specific job openings. Of 35 full-time hiring opportunities during the license term in an area where minorities constitute 10.4% of the labor force, WOOJ hired no minorities. The Commission granted renewal subject to reporting conditions and a $15,000 forfeiture. Like WOOJ, WPFM maintained general contact with its recruitment sources but did not advise them of specific job openings. Moreover, WPFM made no attempt to remedy its EEO program until after the license term had expired. Although WPFM hired three minorities (two Blacks and one American Indian) among those selected for the 29 hiring opportunities during the license term in an area which is 12.8% minority (9.9% Black), the last full-time minority hire was in 1985. Accordingly, while we find no substantial and material question of fact to warrant a hearing, we find it appropriate to impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $15,000.

WTRS/WTRS-FM, Dunnellon

29. In response to our letter of inquiry, the licensee indicated that it had approximately 37 overall and 34 upper-level full-time hiring opportunities[24] from October 1, 1984, through October 1, 1988.[25] The recruitment sources contacted for some of these positions included the *Ocala Star Banner*, *Broadcasting*, Central Florida Community College, and the University of Florida.[26] Two of the 37 hirees were minorities, both Black female receptionists recruited through employment agencies, one in 1985 and one in 1988.[27] Only the 1988 receptionist vacancy produced minority applicants.

30. NAACP/NBMC submit that WTRS/WTRS-FM have not reported the use of any minority recruitment sources. The licensee responds that it routinely contacts the sources listed in its EEO program as well as other agencies that are likely to refer minority candidates. The licensee adds that its annual employment reports "do not accurately portray [the stations'] minority employment records because the timing of employee departures and hirings prevents them from being included in the reports." The licensee further submits that Dunnellon is not easily accessible to the main population center in the MSA, and notes that the stations' workforce is small.[28]

31. We find the EEO record of WTRS/WTRS-FM similar to that of the licensee in *Stations WBBE/WMGB (FM)*, 4 FCC Rcd 8255 (1989) (*WBBE*). In *WBBE*, we granted renewal subject to reporting conditions and an $18,000 forfeiture where the licensee had an unproductive EEO program which it made no attempt to remedy until the end of the license term. WBBE periodically contacted one minority-oriented source, the Lexington Urban League, without mentioning specific job openings. WBBE/WMGB hired one full-time Black of 53 full-time hiring opportunities during the license term in an area which is 9.2% Black. Although WTRS/WTRS-FM attracted few minority applicants during the license term, it made no attempt to contact minority-oriented recruitment sources. Moreover, WTRS/WTRS-FM does not appear to have engaged in self-assessment of its EEO efforts until the end of the license term. During the license term, WTRS/WTRS-FM hired two Blacks of 37 hiring opportunities in an area which is 14.6% Black. Accordingly, while we find no substantial and material question of fact to warrant a hearing, we find it appropriate to impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $18,000.

Station WMMK (FM), Destin

32. In response to our letter of inquiry, the licensee indicated that it had 16 overall and 15 upper-level full-time hiring opportunities from October 1, 1984, through October 1, 1988.[29] The recruitment sources contacted for these positions included the *Playground Daily News*, the *Destin Log*, Okaloosa-Walton Junior College, Vo-Tech School, the American Business Womens Association, and general employment agencies.[30] The licensee did not retain records of the number, race, gender, or recruitment sources of interviewees. None of the 16 hirees was a minority.[31]

33. NAACP/NBMC submit that the licensee's EEO program reflects no minority hires or referrals, and no contact with sources likely to refer minorities. In opposition, the licensee asserts that some employment reports it filed during the license term contained several errors which caused it to overstate the station's total workforce.[32] The licensee attributes the lack of minorities on its staff to the small number of minorities in the area, the difficulty in making a ten-mile commute from Fort Walton Beach, and the station's small workforce. The licensee also notes that it has used daily news feeds since 1985 from a Black reporter who works at another station in the area.

34. We find WMMK(FM)'s EEO record similar to that of the licensee in *Stations WOOJ/WOOJ-FM*, 4 FCC Rcd 6178 (1989) (*WOOJ*). In *WOOJ*, the licensee failed to recruit minorities as vacancies occurred. Until the end of the license term, WOOJ's recruitment efforts were limited to an annual mass mailing which did not list specific job openings. Of 35 full-time hiring opportunities during the license term in an area where minorities constitute 10.4% of the labor force, WOOJ hired no minorities. The Commission granted renewal subject to reporting conditions and a $15,000 forfeiture. Similarly, WMMK attracted no minorities yet made no attempt to contact sources likely to produce minority applicants. It also appears that WMMK did not evaluate the progress of its EEO program until the license term had expired. Had it done so, it would have discovered the aforementioned errors in its Annual Employment Reports. WMMK hired no minorities during the license term despite 16 opportunities in an area which is 9.8% minority. Accordingly, while we find no substantial and material question of fact to warrant a hearing, we find it appropriate to impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $15,000.

WGUL/WGUL-FM, New Port Richey

35. In response to our letter of inquiry, the licensee indicated that it had 14 overall and 13 upper-level full-time hiring opportunities from the time it acquired WGUL-FM in April 1985 through October 1, 1988.[33] The recruitment sources contacted for these positions included the *St. Petersburg Times*, *Radio and Records*, Pasco-Hernando Community College, St. Petersburg Junior College, the NAACP, NOW, FACE Learning Center, and the Urban League.[34] The licensee notes, however, that it had no formal EEO program prior to August 1988 and instead recruited via general employment agencies, newspapers, and over the air. Most of the applicants were recruited through newspaper advertisements or were walk-ins. Of 35 interviewees for the 14 positions, none was a minority. In December 1988, just prior to the end of the license term, the licensee hired a Hispanic announcer; it appears that he was hired part-time and was later promoted to full-time status.[35]

36. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. Unlike *Beaumont*, *supra*, in which designation for an evidentiary hearing was required, the record of WGUL/WGUL-FM does not suggest a sudden, simultaneous departure of minority employees, and no question has been raised regarding the veracity of the information submitted.

37. We find this case similar to but more egregious than *Application of Kansas City Youth for Christ, Inc. for Renewal of License of Station KYFC (TV), Kansas City, MO*, 3 FCC Rcd 6866 (1988) (*Kansas City*). In *Kansas City*, the licensee admitted that it did not have an EEO program. Nonetheless, the licensee was able to hire minorities for two of 19 full-time vacancies in an area where minorities constitute 12% of the labor force. We granted a short-term renewal subject to reporting conditions and a $10,000 forfeiture. Similarly, WGUL/WGUL-FM concedes that it did not have an EEO program until August 1988. The stations hired no minorities during the license term despite 14 hiring opportunities in an area which is 8.8% Black and 5.6% Hispanic. Accordingly, while we find that granting the application for renewal of license for less than a full term will serve the public interest, we also find it appropriate to impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $15,000.

WLVU/WLVU-FM, Dunnedin and Holiday

38. In response to our letter of inquiry, the licensee indicated that it had 58 overall and 48 upper-level full-time hiring opportunities from January 1986 through October 1, 1988. The recruitment sources contacted for some of these positions included the *St. Petersburg Times*, the Urban League, West Pasco Florida Business and Professional Women, the National Association of Hispanic Journalists, the NAACP, and the National Association of Broadcasters.[36] The licensee sent out a form letter to the above organizations as well as to a nationwide cross section of other organizations, colleges and universities. However, the form letter did not list specific job openings. While the licensee submitted copies of a few such letters as documentation of its EEO efforts, most of its documentation consists of generalized form letters. The licensee lists no minority referrals from any of its stated recruitment sources.

39. The licensee is able to list the number, gender, and race of applicants for only 18 of the 58 vacancies. Of the documented applicants, one was a minority, an Asian female who was hired for a clerical position. Although the licensee did not retain records regarding the recruitment sources it used during the license term, it submits that it contacted the sources listed in its EEO program when vacancies arose. In addition, the licensee asserts in its 1988 EEO Program Report that most of the minorities in the MSA work in agriculture and are not available for broadcast employment. Of the 58 persons hired during the license term, none was a minority.[37]

40. NAACP/NBMC argue that the stations lack a meaningful EEO program. They contend that whites in the community are also engaged in agriculture and that the licensee has not offered evidence that minorities prefer agricultural to broadcast work. In opposition, the licensee states that an attachment to its 1988 EEO Program Report

lists 32 colleges and 44 minority organizations to which it sends recruitment letters, both general and specific. It notes that it includes a response card with each letter which requests the source's intended action regarding the job listing. The licensee further submits that it is located more than 20 miles north of the Tampa/St. Petersburg area and that no public transportation is available.

41. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. Unlike *Beaumont, supra*, in which designation for an evidentiary hearing was required, the record of WLVU/WLVU-FM does not suggest a sudden, simultaneous departure of minority employees, and no question has been raised regarding the veracity of the information submitted.

42. We find this case similar to but more egregious than *Application of Woolfson Broadcasting Corporation for Renewal of License of Stations WSBY/WQHQ-FM, Salisbury and Ocean City, MD*, 4 FCC Rcd 6160 (1989) (*WSBY/WQHQ*). In *WSBY/WQHQ*, we found that the licensee did not follow its EEO program. WSBY/WQHQ used minority-oriented recruitment sources for some vacancies but received only two minority referrals. We also found that WSBY/WHHQ did not engage in self-assessment of its EEO program. Of 33 full-time hiring opportunities during the license term in an area where minorities constitute 20% of the labor force, WSBY/WQHQ hired no minorities. Accordingly, we granted a short-term renewal subject to reporting conditions and a $15,000 forfeiture.

43. WLVU/WLVU-FM maintained general contact with minority recruitment sources but does not appear to have contacted those sources for specific vacancies. Moreover, the licensee did not maintain adequate records and does not appear to have engaged in meaningful self-assessment of its EEO program. Had it done so, it would have discovered that its recruitment efforts were not productive. WLVU/WLVU-FM nired no minorities for any of the 54 hiring opportunities during the license term in an area where the available labor force is 15.2% minority. Accordingly, while we find that granting the application for renewal of license for less than a full term will serve the public interest, we also impose reporting conditions to monitor future performance as well as a Notice of Apparent Liability for Forfeiture in the amount of $18,000.

44. Accordingly, *IT IS ORDERED*, that the "Petition to Deny" filed by the National Black Media Coalition and the Florida State Conference of Branches of the NAACP *IS DENIED*, and when considered as an informal objection *IS DENIED*.

45. *IT IS FURTHER ORDERED*, that the "Petition to Deny" filed by the National Hispanic Media Coalition and S.A.L.A.D. *IS DENIED*, and when considered as an informal objection *IS DENIED*.

46. *IT IS FURTHER ORDERED*, that the applications for renewal of licenses filed by Jefferson Pilot Communications Company for Stations WNWS/WLYF(FM) *ARE GRANTED*.

47. *IT IS FURTHER ORDERED*, that the application for renewal of license filed by Ocala Broadcasting Company for Station WMMZ(FM) *IS GRANTED*.

48. *IT IS FURTHER ORDERED*, that the applications for renewal of license filed by Sunshine Wireless Company for Stations WQAM/WKIS(FM), by Lappin Communications-Florida, Inc. for Station WOLL(FM), by Culpepper Communications, Inc. for Station WPFM(FM), by Asterisk Communications, Inc. for Stations WTRS/WTRS-FM, and by Gulfcoast Broadcasting, Inc. for Station WMMK(FM) *ARE GRANTED* subject to the reporting conditions specified herein.

49. *IT IS FURTHER ORDERED*, that the applications for renewal of license filed by Atlantic Media Corporation for Stations WGUL/WGUL-FM and by Pasco Pinellas Broadcasting Company for Stations WLVU/WLVU-FM *ARE GRANTED FOR A SHORT TERM* ending February 1, 1992, subject to the reporting conditions specified herein.

50. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Secton 503, Lappin Communications-Florida, Inc., licensee of WOLL(FM), is hereby advised of its *APPARENT LIABILITY FOR FORFEITURE* in the amount of *THREE THOUSAND DOLLARS* ($3,000) for repeated violation of Section 73.2080 of the Commission Rules, 47 C.F.R. Section 73.2080, in the manner described herein.

51. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Secton 503, Culpepper Communications, Inc., licensee of WPFM(FM), is hereby advised of its *APPARENT LIABILITY FOR FORFEITURE* in the amount of *FIFTEEN THOUSAND DOLLARS* ($15,000) for repeated violation of Section 73.2080 of the Commission Rules, 47 C.F.R. Section 73.2080, in the manner described herein.

52. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Secton 503, Asterisk Communications, Inc., licensee of WTRS/WTRS(FM), is hereby advised of its *APPARENT LIABILITY FOR FORFEITURE* in the amount of *EIGHTEEN THOUSAND DOLLARS* ($18,000) for repeated violation of Section 73.2080 of the Commission Rules, 47 C.F.R. Section 73.2080, in the manner described herein.

53. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Secton 503, Gulfcoast Broadcasting, Inc., licensee of WMMK(FM), is hereby advised of its *APPARENT LIABILITY FOR FORFEITURE* in the amount of *FIFTEEN THOUSAND DOLLARS* ($15,000) for repeated violation of Section 73.2080 of the Commission Rules, 47 C.F.R. Section 73.2080, in the manner described herein.

54. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Secton 503, Gulf Atlantic Media Corporation, licensee of WGUL/WGUL-FM, is hereby advised of its *APPARENT LIABILITY FOR FORFEITURE* in the amount of *FIFTEEN THOUSAND DOLLARS* ($15,000) for repeated violation of Section 73.2080 of the Commission Rules, 47 C.F.R. Section 73.2080, in the manner described herein.

55. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Secton 503, Pasco Pinellas Broadcasting Company, licensee of WLVU/WLVU(FM), is hereby advised of its *APPARENT LIABILITY FOR FORFEITURE* in the amount of *EIGHTEEN THOUSAND DOLLARS* ($18,000) for repeated violation of Section 73.2080 of the Commission Rules, 47 C.F.R. Section 73.2080, in the manner described herein.

56. *IT IS FURTHER ORDERED* that the licensees of the above stations, except for the licensees of WNWS/WLYF(FM) and WMMZ(FM), submit to the Commission an original and one copy of the following information on October 1, 1990, October 1, 1991, and October 1, 1992:

(a) For the October 1, 1990, report, a list of all job vacancies during the 12 months preceding September 1, 1990, and for the October 1, 1991, and October 1, 1992, reports, a list covering the 12 months preceding September 1, 1991, and September 1, 1992, respectively, indicating the job title and full-time or part-time status of the position, the race or national origin, sex, and the referral source of each applicant for each job, which applicants were interviewed, and the race or national origin and sex of the person hired;[38]

(b) A list of employees as of the September 1, 1990 payroll period for the first report and as of the September 1, 1991, and September 1, 1992, payroll periods for the second and third reports by job title, indicating full-time or part-time status (ranked from highest paid to lowest paid), FCC Form 395-B classification, date of hire, sex, and race or national origin; and

(c) Details concerning the stations' efforts to recruit women and minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment.

57. In addition, the licensee may submit any information it believes relevant regarding the stations' EEO performance and its efforts thereunder. With respect to the forefeitures imposed herein, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attatchment to this Order. Any comments concerning ability to pay should include those financial items set forth in the attachment. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The National Hispanic Media Coalition and the Spanish American League Against Discrimination each represent organizations which strive to improve the image and employment of Hispanics in the media.

[2] This Order addresses the EEO efforts of the following stations:

(1) WNWS(AM)/WLYF(FM), Miami (File Nos. BR-881003ZD and BRH-881003C8), licensed to Jefferson-Pilot Communications Company; (2) WMMZ(FM), Ocala (File No. BRH-880919YB), licensed to Ocala Broadcasting Company; (3) WQAM(AM)/WKIS(FM) Miami and Boca Raton, respectively (File Nos. BR-881003UJ and BRH-881003UZ), licensed to Sunshine Wireless Company, Inc.; (4) WOLL(FM), formerly WMXQ(FM), Riviera Beach (File No. BRH-881003ZV), licensed Lappin Communications-Florida, Inc.; (5) WPFM(FM), Panama City (File No. BPH-880817YA), licensed to Culpepper Communications; (6) WTRS/WTRS(FM) Dunnellon (File Nos. BR-880920YO and BRH-880920YN), licensed to Asterisk Communications, Inc.; (7) WMMK(FM), Destin (File No. BRH-880927YV), licensed to Gulfcoast Broadcasting, Inc.; (8) WGUL/WGUL(FM), New Port Richey (File Nos. BR-880927ZK and BRH-880927ZJ), licensed to Gulf Atlantic Media Corporation; and (9) WLVU/WLVU(FM), Dunedin and Holiday, respectively (File Nos. BR-880926UG and BRH-880926UR), licensed to Pasco Pinellas Broadcasting Company.

NAACP/NBMC and NHMC/SALAD each filed a separate "Petition to Deny" against WNWS/WLYF(FM). We also note that NAACP/NBMC withdrew its "Petition to Deny" against WOLL(FM), WPFM(FM), and WGUL/WGUL-FM. Nevertheless, we evaluated the stations' EEO efforts and recommend sanctions for the reasons noted herein.

[3] None of the stations were challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward both women and minorities.

[4] During the 1988 reporting year, *i.e.*, the 12 months preceding filing of the renewal application, WNWS/WLYF received eight minority referrals from the *Miami Herald*, and one minority referral each from Miami Norland Senior High School, Miami Lakes Technical College, and Bauder College. Existing employees referred four minorities.

[5] While 37.5% of the hirees during the last three years of the license term were minorities, the stations' workforce in each of those three years was approximately 20% minority. It thus appears that the station has had difficulty retaining the minorities it hires. We caution the licensee to be aware of this problem in its self-assessment of its EEO efforts.

[6] The Miami MSA is 54.0% minority (37.8% Hispanic, 15.3% Black, 0.8% Asian, 0.1% American Indian). The stations' 1988 Annual Employment Report indicates that of 57 overall employees, five (8.8%) are Black and six (10.5%) are Hispanic. Of 48 upper-level employees, three are Black and three are Hispanic (6.3%). In 1987, the stations employed six Blacks and six Hispanics (10.9%) of 55 overall employees. Of 45 upper-level employees, three (6.7%) were Black and two (4.4%) were Hispanic. In 1986, the stations employed 58 persons overall, including seven Blacks (12.1%) and six Hispanics (10.3%). Of 50 upper-level employees, four were Black and four were Hispanic (8.0%).

The licensee contends that the labor force data for the combined Miami-Ft. Lauderdale area CMSA is a more appropriate basis for comparison than the Dade County MSA. It asserts that the stations are located seven-tenths of a mile from the Broward County line approximately equidistant between Miami and Ft. Lauderdale. The licensee also notes that the stations' workforce is divided between the two counties.

Our initial frame of reference in analyzing EEO efforts is labor force data for the MSA in which the station is located or, when the station is outside the MSA, the county in which the

station is located. In the *Broadcast EEO Report and Order, supra*, we listed three factors where the use of alternative data would be appropriate: (1) the distance from the station to areas with significant minority population is great; (2) the commute from areas with significant minority populations to the station is difficult; and (3) bona fide recruitment efforts aimed at the MSA minority work force have not yielded positive results. 2 FCC Rcd at 3973. Because the licensee of WNWS/WLYF does not allege any of these factors, it has not presented sufficient evidence to justify use of an alternative labor force.

[7] The Ocala Metropolitan Statistical Area (MSA) is 16.8% minority (14.6% Black, 1.8% Hispanic, 0.1% Asian, 0.3% American Indian). The station notes that because it erroneously listed a Hispanic female as white, its 1988 Annual Employment Report should include one Black (6.67%) and one Hispanic (6.67%) among 15 overall employees and one Hispanic (7.1%) among 14 upper-level employees. The station's 1987 report lists 16 overall and 14 upper-level employees, including one lower-level Black (6.3%).

[8] The licensee indicates that it received one minority referral during the 1988 reporting year via a sales seminar.

[9] Hispanics comprise only 1.8% of the available labor force. Blacks are the dominant minority group in Ocala. Because Blacks are the dominant minority, we have analyzed the stations' efforts regarding Blacks apart from its efforts to recruit other minorities.

[10] In addition, a Black male was recruited for the position of Sales Manager in September 1988 and was scheduled to begin work in October. As a result of his employment contract with another radio station, however, he was unable to accept the position.

[11] If a licensee obtains a meaningful pool of referrals and applicants via reliance on general sources, it will not be faulted for failing to contact minority-specific sources. On the other hand, where a licensee does not obtain meaningful results from general sources and also has failed to contact minority-specific sources, questions will be raised concerning the licensee's EEO efforts. *See Application of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990).

[12] The licensee has owned WKIS-FM, which was formerly affiliated with WLQY(AM), since 1982. The licensee submits hiring information from February 1985 although it did not acquire WQAM(AM) until later in 1985.

[13] The *News & Sun Sentinel* yielded 10 minorities and existing employees referred five minorities during the 1988 reporting year.

[14] WQAM and WKIS-FM are licensed to different MSAs (Miami and Boca Raton) and operate out of a single studio in a third MSA (Fort Lauderdale-Hollywood). The licensee notes that it initially owned WKIS-FM with WLQY(AM), which is licensed to Hollywood, and conducted most of its operations out of the Hollywood studio, although WKIS-FM maintained its main studio in Boca Raton. In 1985, when the licensee sold WLQY(AM) and purchased WQAM(AM), which is licensed to Miami, it received a waiver of the Commission's Rules to broadcast from its Hollywood studio location. In 1987, the licensee notified the Commission that it was moving the main studio location for WKIS-FM to Hollywood pursuant to an amendment to Section 73.1125 of the Commission's Rules, 47 C.F.R. Section 73.1125, which permits a station to locate its main studio outside of the community of license so long as the studio is located within the station's prinicpal community contour. The licensee submits that the Hollywood studio is within the principal community contour of Boca Raton.

NAACP/NBMC contend that the Commission should evaluate the stations' EEO efforts in light of Miami MSA statistics. The licensee submits that Fort Lauderdale-Hollywood figures are more appropriate. In *Application of Certain Broadcast Stations Serving Communities in Michigan and Ohio*, 3 FCC Rcd 6944 (1988) (*Michigan and Ohio)*, we held that the reference point for EEO analysis is a station's community of license rather than the location of its studio. In that case, WUAB was licensed to Lorain, Ohio but moved its main studio to a city within the Cleveland MSA, an area with significantly higher minority representation than the community of license. While we decided that use of Lorain statistics was appropriate, we stated that "[s]hould the licensee continue to maintain its main studio near Cleveland -- an area with a larger minority presence than Lorain -- we will, in future license renewal proceedings, review its efforts in light of the larger minority presence." 3 FCC Rcd at 6950 n.22.

The WQAM/WKIS situation is even more complex. While most of the stations' personnel activity occurs in the Fort Lauderdale-Hollywood area, some of the licensee's recruitment takes place in Miami. It also appears that the stations broadcast to the Miami area, and WQAM(AM)'s transmitter is located in Miami. Given that *Michigan and Ohio, supra*, was released a month after the licensee filed its renewal application, we have evaluated the licensee's EEO efforts in light of Fort Lauderdale labor force statistics for purposes of this review only. We caution the licensee, however, that in future license renewal proceedings we will refer to labor force statistics for Miami, the site of the larger minority presence.

Moreover, we remind NAACP/NBMC and the licensee that failing to meet the Commission's processing guidelines does not in and of itself demonstrate the inadequacy of a licensee's EEO efforts. The Commission instead focuses on a licensee's overall efforts to recruit, hire, and promote minorities. *See Catawba Valley Broadcasting Company, supra.*

The Fort Lauderdale-Hollywood MSA is 15.8% minority (10.8% Black, 4.3% Hispanic, 0.5% Asian, 0.2% American Indian). The stations' 1988 Annual Employment Report lists 37 full-time employees, including three Blacks (8.1%) and two Hispanics (5.4%). Of 29 upper-level employees, one is Black (3.4%) and two are Hispanic (6.9%). The 1987 Annual Employment Report lists 34 full-time employees, including 2 Blacks (5.9%) and 1 Hispanic (2.9%). Of 27 upper-level employees, one was Black (3.7%) and one was Hispanic (3.7%). The 1986 Annual Employment Report lists 36 employees, including two Blacks (5.6%), one Hispanic (2.8%), and one American Indian (2.8%). Of 29 upper-level employees, one was Black (3.4%), one was Hispanic (3.4%), and one was American Indian (3.4%).

[15] NAACP/NBMC also allege the station's public file did not contain any Issues-Programs lists for 1986, 1987, or 1988. Because NBMC/NAACP did not provide facts to support its allegations and the licensee specifically denies the allegation with supporting affidavits, we cannot find that the licensee did not have Issues/Programs lists in its files during that time.

[16] The licensee states that it has had difficulty attracting minorities due to the stations' country and western format. A station's format has no bearing on its EEO obligations. *See Leflore Broadcasting Company, Inc. v. F. C. C.*, 66 FCC 2d 734, 784-85 (1975) (*Leflore*).

[17] Station WMXQ(FM) changed its call letters to WOLL(FM) on November 7, 1989.

[18] The Riviera Beach MSA is 20.2% minority (13.8% Black, 5.7% Hispanic, 0.5% Asian, 0.2% American Indian). The station's 1988 Annual Employment Report lists one Black among 18 overall employees (5.6%) and no minorities among 14 upper-

level employees. In 1987, the station employed two among 16 overall employees (12.5%) and no minorities among 12 upper-level employees. In 1986, the station employed one Black among 19 overall employees (5.3%) and no minorities among 15 upper-level employees.

[19] During the 1988 reporting year, two minorities were referred by the *News & Sun Sentinel* and four minorities were referred by Job Services of Florida.

[20] Although the licensee states that it has had difficulty attracting minorities due to the station's big band format, we have previously indicated that a station's format has no bearing on its EEO obligations. *See Leflore, supra.*

[21] In addition, the licensee hired a Black sales worker on October 3, 1988, outside the period covered by our letter of inquiry but before expiration of the license term.

[22] The Panama City MSA is 12.8% minority (9.9% Black, 1.2% Hispanic, 0.9% Asian, 0.8% American Indian). The station's 1988, 1987, and 1986 Annual Employment Reports list 15 full-time employees, 13 in upper-level positions, and no minorities.

[23] During the 1988 reporting year, Gulf Coast Community College yielded one minority referral.

[24] The licensee's response to our inquiry lists 53 hirees but for the most part does not distinguish between part-time and full-time positions. We have not counted those positions which the licensee identifies as part-time or temporary, nor have we counted promotions from part-time to full-time status. Positions not specifically designated as full-time or part-time have been counted as full-time positions.

[25] The Dunnellon MSA is 16.8% minority (14.6% Black, 1.8% Hispanic, 0.1% Asian, 0.3% American Indian). The stations' 1988 Annual Employment Report lists no minorities among 14 employees overall and 13 upper-level employees. In 1987, the stations employed no minorities among 13 overall and 11 upper-level employees. In 1986, the stations employed one Black among 16 overall employees (6.3%) and 14 upper-level employees (7.1%).

[26] During the 1988 reporting year, the licensee received three minority referrals from *Broadcasting*, one minority referral from Citrus High School and five minority referrals from Job Service of Florida.

[27] The receptionist hired in 1985 was subsequently promoted, first to traffic manager and later to sales representative.

[28] The licensee has made no formal alternative labor force request. Moreover, we note that it has not provided information sufficient to satisfy the three-part test set out in the *Broadcast EEO Report and Order, supra.*

[29] The licensee indicates that an announcer was promoted from part-time to full-time status in December 1985. This is not counted as a new hire but as a promotion.

[30] The licensee lists no minority referrals during the 1988 reporting year.

[31] The Fort Walton Beach MSA is 9.8% minority (6.5% Black, 1.5% Hispanic, 1.4% Asian, 0.4% American Indian). The station's 1988 Annual Employment Report lists no minorities among 16 overall and 13 upper-level employees. The station's 1987 Annual Employment Report lists no minorities among 14 overall and 13 upper-level employees. In 1986, the station employed no minorities among 15 overall employees and 13 upper-level employees.

[32] Upon discovery of these errors, the licensee filed corrected Annual Employment Reports for 1984 through 1988.

[33] The licensee lists two clerical workers listed as "trial" employees and indicates that they each worked for the stations for three weeks. These employees are not counted as full-time hirees.

[34] While the licensee had initially indicated that the *St. Petersburg Times and Radio and Records* each yielded one minority referral, and updated 1988 EEO Program Report filed with its response to our inquiry lists no minority referrals.

[35] The Tampa/St. Petersburg/Clearwater MSA is 15.2% minority (8.8% Black, 5.6% Hispanic, 0.5% Asian, 0.3% American Indian). The stations' 1988 Annual Employment Report lists no minorities among 14 overall and 12 upper-level employees. In 1987, the stations employed no minorities among 14 overall and 13 upper-level employees.

Although WGUL makes no formal alternative labor force request, it seeks to mitigate its inadequate EEO record based upon a difficult commute and the lack of minorities in the New Port Richey area. The licensee has not provided sufficient information to satisfy the three-part test set out in the *Broadcast EEO Report and Order, supra.*

[36] During the 1988 reporting year, the station received one minority referral from an existing employee.

[37] The Tampa-St.Petersburg-Clearwater MSA is 15.2% minority (8.8% Black, 5.6% Hispanic, 0.5% Asian, 0.3% American Indian). The stations' 1988 Annual Employment Report lists no minorities among 16 overall employees and 13 upper-level employees. In 1987, the stations employed no minorities among 15 overall and 13 upper-level employees.

[38] Such a list might start:

(1) News Director; Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WINFAS, INC. File No. BRH-880718YA

For Renewal of License of
Station WKOO(FM)
Formerly Station WRCM(FM)
Jacksonville, North Carolina

TAR HEEL BROADCASTING SYSTEM, INC. File Nos. BR-88075UK BRH-880725YJ

For Renewal of License of
Stations WRRF/WDLX-FM
Washington, North Carolina

BD COMMUNICATIONS CO., INC. File Nos. BR-880729UT BRH-880729YN

For Renewal of License of
Station WBTB
Beaufort, North Carolina and
Station WZYC-FM
Newport, North Carolina

DICK BROADCASTING COMPANY, INC. File No. BRH-880801B7

For Renewal of License of
Station WKRR(FM)
Asheboro, North Carolina

MEMORANDUM OPINION AND ORDER AND NOTICES OF APPARENT LIABILITY

Adopted: June 13, 1990; Released: August 10, 1990

By The Commission:

1. The Commission has before it for consideration: (i) an informal objection[1] filed November 1, 1988, by the National Black Media Coalition, the North Carolina State Conference of Branches of the NAACP, and various local NAACP branches (hereafter "NBMC/NAACP")[2] against the above-captioned renewal applications; (ii) oppositions from the licensees; (iii) NBMC/NAACP's reply; and (iv) the licensees' responses to staff letters of inquiry. NBMC/NAACP allege that the above-captioned stations violated the Commission's EEO rules and policies. NBMC/NAACP request that the Commission investigate the stations' employment practices and designate the applications for hearing.

2. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's on-going assessment of its EEO efforts. The latter enables the licensee to take corrective action if, for example, qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by a licensee.

3. When the renewal application reveals no evidence of discrimination and a record of adequate EEO efforts, it is granted if otherwise appropriate. When the application indicates evidence of a record of inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, the submission of a modified EEO program, renewal for less than a full-term, a forfeiture, or a combination thereof. Further, if substantial and material questions of fact exist or if we otherwise cannot find that grant of the application would be consistent with the public interest, we designate the application for hearing. 47 U.S.C. Sec. 309(d)(2); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (" *Beaumont* "); *Bilingial - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (" *Bilingual* "); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (" *Broadcast EEO* ").

4. Review of each licensee's EEO record leads us to conclude that petitioners have presented a *prima facie* case against each challenged station, so that unconditional grant of the applications for renewal would be inconsistent with the public interest. *Astroline Communications v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*). Each station's records evidenced an EEO program which reflected inadequate EEO efforts. [3]

5. Review of each licensee's opposition and response to our inquiry leads us to conclude that no substantial and material questions of fact remain with respect to each of the challenged licensees. Thus, grant of each application will serve the public interest. 47 U.S.C. Sec. 309(d)(2). *Astroline*, *supra*. Accordingly, appropriate sanctions and/or remedies will be imposed. Our analysis of each licensee's EEO efforts follows.

WKOO (FM), [4] Jacksonville [5]

6. The station's EEO program reflects that, during the reporting year, *i.e.*, the 12 months prior to the filing of the renewal application, 13 minority referrals were obtained for the 18 jobs filled following contacts with two schools, two organizations, two personnel agencies, the state employment commission, and advertisements in three newspapers. All were for positions in the upper-four job categories.[6] Among the hires were nine women and three minorities. However, the licensee acknowledges that the station has experienced difficulty in attracting minority applicants in the past, which it attributes to the station's country and western format.[7]

7. Additional information supplied by the licensee reveals that, during a three year period (July 1985 to July 1988), the licensee had 31 full-time hiring opportunities, 30 of which were for positions in the upper-four job categories. Five of the persons hired were minorities, all for upper-level positions. Only seven minorities were among the persons interviewed. In 13 instances (three involving minorities), the person hired was the only person interviewed. Use of the local minority newspaper directed to the minority community, contacts with colleges with high minority enrollments, and other efforts geared toward attracting potential minority job applicants did not begin until the summer of 1988.

8. We find that the licensee's record does not warrant designation for hearing because it does not raise any substantial and material questions of fact about the licensee's employment practices. The licensee employed minorities during most of the license term. However, with one exception noted above, recruitment efforts did not include use of sources likely to produce qualified minorities until the summer of 1988, shortly before the filing of the station's renewal application.[8] As a result, only seven minorities were interviewed during a three-year period in which the station filled 31 full-time jobs. Had appropriate self-assessment occurred, the licensee would have discovered before the summer of 1988 that its recruitment efforts needed modifications. Accordingly, to assure ourselves that the licensee's recruitment and self-assessment comports fully with our rules, we will impose reporting conditions.[9] *See South Carolina Renewals, supra*, n.8. (*WODE/WNOK-FM*). *See also Station WFBR*, 3 FCC Rcd 5913, *erratum*, 3 FCC Rcd 7145 (1988); *Media Com, Inc.*, 55 RR 2d 1291 (1984).

WRRF/WDLX-FM, Washington

9. The stations' EEO program reports that contacts with nine educational institutions, eight minority or women's organizations, and the state employment security commission yielded 22 minority referrals for the 12 jobs filled during the reporting year. (It was later revealed, however, that 12 of the minority referrals were for two clerical jobs.) Three of the new hires were minorities. Ten of the new hires were for positions in the upper-four job categories; one of those hires was a minority. The licensee asserts that its rural location and competition for employees from the nearby Raleigh-Durham market have placed the stations at a "disadvantage" in attracting minority job candidates. Nonetheless, it contends that the stations' program is now having positive results.[10]

10. NBMC/NAACP characterize the stations' EEO program as "marginally acceptable" but criticize the stations for not achieving parity during the license term despite "a very high turnover rate." The licensee claims it has made repeated attempts to recruit minorities, and it supplies copies of letters sent to various organizations and schools in May and July, 1987 and January and November, 1988. The 1987 letters advise that the stations are an equal opportunity employer, while the 1988 letters solicit applicants for specific jobs. NBMC/NAACP label the licensee's efforts as "sporadic" because the correspondence the licensee furnished refers to "three or four" jobs although the stations filled 12 jobs during the reporting period. In addition, NBMC/NAACP question whether the stations view the processing guidelines[11] as quotas because a licensee letter to counsel suggests that employment of minorities at or above the guidelines is a requirement of the Commission.

11. Additional information supplied by the licensee reveals that, over a nearly four year period (January 1, 1985 to December 1, 1988), the stations hired 26 persons for full-time positions. The 26 positions included 23 upper-level jobs. The recruitment contacts generated minority applicants for 12 of the 26 jobs. At least one minority appeared in the applicant pools for each of the 23 upper-level jobs. Two minorities were hired for lower-level positions and two for upper-level positions.

12. We conclude that the record before us does not raise a substantial and material question of fact warranting designation of the applications for hearing. Although the stations did not consistently contact minority recruitment sources, they made some recruitment efforts with respect to virtually all full-time jobs filled, maintained adequate records of recruitment contacts and applicant pools, hired minorities for a variety of positions, and employed at least one minority in an upper-level position throughout the license term.

13. However, considering the sizable minority presence in the local labor force and the apparent lack of success in obtaining minority applicants, particularly in the upper-level jobs, it was incumbent on the licensee to use additional recruitment efforts which could result in qualified minority applicants.[12] In our view, the licensee's submissions indicate that such efforts did not occur consistently.[13] Accordingly, to ensure that the licensee will make appropriate recruitment efforts for every job filled, we will impose reporting conditions. *Applications for Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685 (1989) (*KVII-TV*); *Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd at 1910.

WBTB, Beaufort and WZYC, Newport

14. The stations' inquiry response indicates that from December 1985 (when the licensee acquired the stations) through May 1988, the stations' hired[14] 27 full-time employees.[15] Between December 1985 and July 1987, the licensee contacted general recruitment sources for 15 vacancies. Beginning in July 1987, the recruitment sources contacted (when recruitment occurred) included at least one source directed toward minorities. During the reporting year, i.e. the 12-month period prior to filing of the renewal application, the stations contacted various recruitment sources including three newspapers, two colleges, the National Organization for Women (NOW), the NAACP, two military offices, and the state employment security commission. The stations received six minority referrals from these sources as well as receiving four minority referrals from station employees. The station interviewed more than one person for 14 of the 27 jobs, but only one of the persons interviewed was a minority. Of the 27 full-time employees hired by the station, none were minorities.

15. NBMC/NAACP question whether the licensee actually contacted NOW and the NAACP for recruitment. NBMC/NAACP also note that neither of the two minorities hired during the EEO reporting period appeared on the stations' 1988 Annual Employment Report, concluding that they were employed for only a short time. Finally, comparing the number of hires (25 full-time and part-time) during the 12 month reporting period with the number of employees at the stations (29 full-time and

part-time) and noting the increase in the number of full-time employees during the licensee's tenure (from 13 to 22), NBMC/NAACP conclude that the stations have hired few minorities despite many hiring opportunities.

16. The licensee responds that it contacted all of the referral sources listed in its EEO program "on numerous occasions." As for the two minority hires reflected in the stations' EEO program, the licensee explains that both were hired after the payroll period used for the 1988 Annual Employment Report. While the licensee acknowledges that one of the minorities left after six weeks of employment, it notes that the other was still employed at the stations as of December 1, 1988. In addition, the licensee points out that the stations hired another minority in September 1988, more than a month before the instant informal objection was filed. The licensee concedes that its early minority recruitment efforts were not successful. However, the licensee contends that it implemented a new recruiting program in August 1987 and that its performance should be judged on the basis of its more recent efforts.[16] Finally, the licensee states that it has added four North Carolina colleges to its recruitment list and that it hopes to add an intern program.

17. In our view, the instant record does not warrant designation for hearing. The stations' submissions reflect some efforts, beginning in July 1987, to contact potential sources of minority employment. In addition, in 1988, the stations hired two minorities for full-time jobs. Both minorities were hired toward the end of the license term but before NBMC/NAACP filed their informal objection. Accordingly, we conclude that the licensee's record does not raise a substantial and material question of fact about discrimination. *Cf. Robert A. Dwyer*, 4 FCC Rcd 6178 (1989); *Florida Renewals*, 3 FCC Rcd 1930, 1931 (1988) (*WTCL-TV*). *But Cf. Beaumont, supra*; *Bilingual, supra*.

18. However, we find that the licensee's EEO efforts were inadequate. The stations did not make any attempts to contact minority recruitment sources between December 1985 and July 1987, and contacted only one sporadically thereafter. As a result, the stations did not hire a minority for a full-time job until the waning months of the license term and interviewed a minority for only one of the 27 full-time jobs filled between December 1985 and May 1988.[17] Considering the belated and inconsistent nature of the licensee's efforts to recruit minorities and the virtual absence of minority employees, hires, and interviewees for full-time positions during most of the licensee's tenure, we conclude that both prospective remedies and sanctions are warranted. In a similar situation, where a licensee in an area with a 16% minority labor force had, for example, no minority hires and few minority interviews for 26 full-time jobs over a 30 month period, we imposed a forfeiture of $5,000 and required submission of EEO reports. *South Carolina Renewals, supra*, n.8. (*WSPA/WSPA-FM*). Accordingly, we will impose reporting conditions and a forfeiture in the amount of $5,000 for repeated violations of Section 73.2080(b)(3), (b)(5), (c)(2), and (c)(5) of the Commission's Rules.

WKRR (FM), Asheboro

19. The station's EEO program indicates that, during the reporting year, it obtained four minority referrals from contacts with two colleges and solicitations of employees. However, none of the station's seven hires during the reporting year was a minority. The licensee attributes its recruiting difficulties to the relatively small percentage of minorities in the Randolph County Workforce, claimed by the licensee to be 6.1% and the presence of "more attractive employment opportunities" in the textile and furniture fabrication industries. The licensee states that after using local organizations, schools and newspapers, it broadcast recruitment messages and contacted the referenced colleges as well as a black-formatted station in the area. The licensee plans to advertise in the Greensboro and Winston-Salem newspapers and contact additional colleges and minority organizations, including the local chapter of the NAACP.[18]

20. NBMC/NAACP contend that the licensee's claims about the textile and furniture industries and its use of the Randolph County labor force (rather than the MSA labor force) are intended to divert attention from the licensee's deliberate failure to comply with the Commission's EEO rules. NBMC/NAACP note that the WKRR(FM) program did not report use of minority organizations or media for recruitment, and they charge that the 1988 employment reports at sister stations in Tennessee[19] reflect no or low minority employment in upper-level jobs. NBMC/NAACP conclude that the licensee's failure to follow the EEO rules, not local market conditions, is the cause of the station's record.

21. The licensee submits that the renewal challenge is premised on statistics, and it argues that the station's apparent shortfall in minority employment is insignificant. The licensee acknowledges that its use of county labor force data rather than MSA labor force data was error, but it contends that mistake did not detract from its recruitment efforts. In addition to the contacts referenced in its EEO program, the licensee states that it contacted Winston-Salem State University, a school with a predominantly black enrollment, and that it initiated an intern program. While the licensee asserts that it sought interns from a number of colleges, it acknowledges that only one college provided them. One of the interns was black. The licensee plans to expand its sources to include another predominantly black college.

22. The licensee repeats its contention that its efforts to employ minorities were hampered by the local textile and furniture industries, citing the loss of a female employee to a furniture manufacturer. The licensee also submits that low unemployment in the area contributed to the station's difficulties in hiring minorities. With respect to its sister stations, the licensee notes that both have employed minorities both overall and in upper-level positions in 1988 as well as in prior years. The licensee concludes that its lack of results in employing minorities is not the result of an intent to discriminate or a lack of efforts to recruit.

23. Additional information submitted by the licensee, however, reveals that the station's recruitment efforts were not substantial or continual. Hiring data show that the station filled 22 full-time positions between April 1, 1985 and May 1988. Seventeen were upper-level jobs; five were lower-level jobs. No minorities were hired. The station advertised in *Radio & Records* for three on-air positions and "nationally" for an on-air/production job, used a search firm for one other on-air job, advertised over-the-air for a receptionist, notified two schools with respect to the traffic director's job, contacted a state employment services agency for two clerical jobs, and recruited for a salesman. However, in only three instances does it appear that minority sources were used. The records also reflect that for nine of the hires only one applicant was consid-

ered. Moreover, only three of the applicant pools had blacks. None of the candidates for an upper-level position was identified as black.

24. We find that the instant record does not warrant designation for hearing because no substantial and material question of intentional discrimination is raised. The licensee did make some efforts to seek referrals, including minority referrals, and varied those efforts over time. In addition, the station did have one black intern. Finally, the licensee recognized, albeit belatedly, that its methods of recruitment required substantial modifications, and it proposed, prior to the NBMC/NAACP renewal challenge, to contact different sources for minority applicants. Accordingly, we do not believe a hearing is warranted.[20] *Cf. Beaumont, supra*; *Bilingual, supra*.

25. However, we also find that the licensee did not make positive and continuing efforts to recruit minorities. For the majority of the jobs filled, the licensee did not demonstrate any nexus between its claimed minority recruitment contacts and particular job hires. The list of recruitment sources used for each hire reflects that the station recruited for only 10 of 22 hires and used minority sources for only three of those hires. In the three instances where minority sources were used, the applicant pools had blacks. None of the other applicant pools contained blacks. Hence, we conclude that the licensee failed repeatedly to comply with Section 73.2080 (c)(2) of the Commission's Rules, 47 C.F.R. Section 73.2080.

26. In addition, the licensee's self-assessment for most of the license term appears to have been erroneous. Regardless of whether reference was made to Randolph County, the county of license, or Guilford County, where the station's studio was actually located, *see Michigan and Ohio TV Stations*, 3 FCC Rcd 6944, 6945 (1988), the licensee should have ascertained that the labor force in the Greensboro - Winston Salem - High Point MSA was the relevant one for self-assessment. Moreover, we reject the licensee's explanation that the local furniture and textile industries had any impact on its minority recruitment. There is no logical connection between the loss of one female employee to a furniture manufacturer and the licensee's conclusion that recruitment of minorities was hampered by the presence of industries totally unrelated to broadcasting. Similarly, there is no support for the belief that low unemployment in the area rendered recruitment of minorities more difficult.[21] Thus, the licensee's self-assessment was not premised on our rules.

27. In our recent decision involving the renewal applications of various South Carolina radio stations, we granted a short-term renewal and imposed reporting conditions and a $10,000 forfeiture on three licensees which had EEO deficiencies similar to those of WKRR(FM). The licensees of WKZQ/WKZQ-FM, Myrtle Beach, and WGSN/WNMB(FM), North Myrtle Beach, are located in a county that included 19.4% minorities (17.9% blacks) in the labor force. WKZQ/WKZQ-FM went six and one-half years without a black in an upper-level job and recruited for only 12 of the 39 upper-level jobs filled during the license term. WGSN/WNMB(FM) went close to four years without a black applicant for 27 full-time jobs filled, recruited for only 11 of those jobs, and did not propose to modify their program until NBMC/NAACP challenged their EEO practices. WSCQ(FM) did not recruit, hire or interview a black person for the 20 full-time upper-level positions filled during the license term in an area where the labor force included 25.8% minorities (24.1% blacks). *South Carolina Renewals, supra*. In the instant case, the licensee of WKRR(FM) recruited sporadically, made few efforts to seek out minority applicants despite having no minorities on its staff and few minority applicants during a 31 month period and being located in an area that includes 17.8% minorities (16.8% blacks) in the local labor force. Accordingly, we believe similar sanctions and remedies are warranted. Thus, we will grant renewal for less than a full-term and require the submission of EEO reports. Also, for the apparent repeated failures to contact potential sources of minority applicants as required by Section 73.2080(c)(2) of the Commission's Rules, we will impose a forfeiture in the amount of $10,000.

28. Accordingly, *IT IS ORDERED*, that the informal objection filed by he NBMC/NAACP *IS DENIED*.

29. *IT IS FURTHER ORDERED*, that the license renewal applications for Stations WKOO(FM), WRRF/WDLX-FM, and WBTB/WZYC-FM) *ARE GRANTED*, subject to the EEO reporting conditions specified herein.

30. *IT IS FURTHER ORDERED*, that the license renewal application of WKRR(FM) *IS GRANTED FOR A SHORT-TERM* ending August 1, 1992, subject to the EEO reporting conditions specified herein.

31. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a Notice of Apparent Liability for forfeiture of $5,000 for the licensee of Stations WBTB/WZYC-FM, and $10,000 for the licensee of Station WKRR(FM).[22]

32. *IT IS FURTHER ORDERED* that the licensees of the above stations submit to the Commission an original and one copy of the following information on August 1, 1991, August 1, 1992, and August 1, 1993:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source for each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[23]

(b) a list of employees as of the July 1, 1991, payroll period for the first report and as of the July 1, 1992 and July 1, 1993 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex, and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

33. *IT IS FURTHER ORDERED*, that the Mass Media Bureau send by Certified Mail - Return Receipt Requested one copy of this Memorandum Opinion and Order

and Notices of Apparent Liability to the licensees as well as counsel for the National Black Media Coalition, the NAACP and each of the licensees.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The pleading filed by the National Black Media Coalition *et al.* was styled a Petition to Deny. However, the pleading did not include affidavits or declarations under penalty of perjury from individuals who were listeners of the above-captioned stations or residents of the stations' service areas. Thus, the pleading was not filed by a "party in interest" and does not qualify as a petition to deny. Section 309 (d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309 (d)(1). Accordingly, we will treat the renewal challenge as an informal objection. *Broadcast Stations Serving the State of Florida*, 3 FCC Rcd 1930 (1988) (" *Florida Renewals* ").

The Petition to Deny was directed against 35 radio stations located in the States of North Carolina and South Carolina. The challenged stations not addressed in this document either have been or will be addressed in other Commission or staff documents, as appropriate. *E.g., Stations WGBR and WEQR*, 4 FCC Rcd 1621 (1989); *Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (*South Carolina Renewals).*

[2] The National Black Media Coalition ("NBMC"), headquartered in Washington, D.C., describes itself as a national association of black organizations and persons seeking additional employment, program service and ownership in the media.

[3] None of the stations were challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts towards both women and minorities.

[4] Station WRCM(FM) changed its call letters to WKOO(FM) on October 1, 1989.

[5] NBMC/NAACP withdrew their informal objection by letter dated March 31, 1989. However, for the reasons noted herein, we find that imposition of prospective remedies to assure future compliance is warranted.

[6] The Jacksonville MSA labor force includes 48.7% women and 19.9% minorities (15.8% Blacks). The station's Annual Employment Reports for the license term reveal that, in 1982, 1984-85, and 1987, the staff of 21 full- time employees included one (4.8%) minority. The 19 upper-level employees for those years did not include a minority in 1982 but did include a minority (5.3%) in 1984, 1985 and 1987. In 1983, the staff of 19 had one minority (5.3%), who was not among the 17 upper-level employees. In 1986, the station reported 20 full-time employees, of whom two (10%) were minorities. Both (11.1%) were among the 18 employees who held upper-level jobs. However, none of the 20 full-time (18 upper-level) employees listed on the station's 1988 report was a minority.

[7] As the Commission stated in *Leflore Broadcasting, Inc. v. FCC*, 66 FCC 2d 734, 784-85 (1975), a station's format has no bearing on its EEO obligations.

[8] Yet, if a licensee obtains a meaning pool of referrals and applicants from *e.g., exclusive* reliance on general sources, it will not be faulted for failing to contact minority specific sources. *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC 1704, 1709 n.8 (1990) (*South Carolina).*

[9] Licensees should engage in self-assessment periodically throughout the license term, not just at the end of the term. The frequency with which licensees should engage in self-assessment will vary according to factors including, but not limited to, the length of the licensee's tenure, the number of hiring opportunities and the demographics. At such times, licensees should review the productivity of their recruitment sources in producing qualified female and minority applicants, and if not productive, modify their efforts as appropriate, until productive results are obtained.

[10] Washington is located in Beaufort County. Its labor force includes 42.5% women and 27.5% minorities (27.1% blacks). The stations' Annual Employment Reports show that in 1982, there were 11 full-time employees and 10 upper-level employees. In 1983 and 1984, the stations had 10 full-time employees, eight of whom were in upper-level jobs. Subsequently, the number of full-time employees increased from 12 (10 upper-level) in 1985, to 14 (13 upper-level) in 1986, to 16 (15 upper-level) in 1987, and to 17 (16 upper-level) in 1988. The reports reveal that the stations employed one minority in an upper-level job during each year of the license term, and an additional minority in a clerical position in 1988. Thus, the percentages of minorities at the stations initially rose from 9.1% overall and 10% for upper-level jobs in 1982 to 10% overall and 12.5% for upper-level jobs in 1983 and 1984, then declined to 8.3% overall (10% upper-level) in 1985, 7.1% (7.7% upper-level) in 1986, and 6.3% overall (6.7% upper-level) in 1987. In 1988, the overall percentage of minorities rose to 11.8% but decreased in upper-level jobs to 6.3%.

[11] *See EEO Processing Guidelines*, 46 RR 2d 1693, *recon. denied*, 79 FCC 2d 922 (1980).

[12] *See* note 8, *supra*.

[13] Moreover, to the extent the licensee's comments reflect a belief that we require employment of any group at a particular level relative to its local presence, the licensee is mistaken. As we have repeatedly emphasized, "the processing guidelines are not quotas nor do they establish upper limits for minority and female employment." *Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913, 1916 (1988). A licensee's efforts to recruit, employ, and promote minorities and women are to occur regardless of the extent of their presence at the station. *Carolina Christian Broadcasting, Inc.*, 3 FCC Rcd at 1907, 1910.

[14] One of the employees noted as a full-time hire was a transferee from the licensee's parent company. Our discussion of the licensee's hiring activities does not include this transfer.

[15] Beaufort and Newport are located in Carteret County. That county's labor force includes 41.4% women and 9.2% minorities (7.8% black). The licensee acquired the stations in December 1985. The stations' Annual Employment Reports for the years 1986, 1987 and 1988 show an increase in the number of full-time employees from 13 in 1986 to 19 in 1987 and to 22 in 1988. All but two of the employees for the 1986 and 1988 and all but three in 1987 are listed in the upper-four job categories. The three reports reflect that none of the listed full-time employees were minorities.

[16] A declaration under penalty of perjury from the former general manager of the stations and a "statement" from the present general manager explain in greater detail the various recruitment efforts undertaken since August 1987. While contacts and advertisements in 1987 did not lead to minority applicants, those in 1988 led to the three noted minority hires and interviews with several other minorities. However, the present

general manager concedes that the stations did not advertise for 10 of the 18 full-time hires that occurred between July 1987 and July 1988. The licensee previously provided information which indicated that recruitment did not take place for 12 positions from 1985 to 1988.

[17] *See* note 8, *supra*.

[18] Asheboro is located in Randolph County, which is part of the Greensboro Winston Salem - High Point MSA. That MSA's labor force is 45.3% women and 17.8% minorities (16.8% blacks). The licensee acquired the station's license on April 1, 1985. In 1986, the Annual Employment Report for WKRR(FM) included employees assigned to WKXR, a co-owned AM station. In August 1986 the license for WKXR was assigned to Randolph Broadcasting., an entity separate from the licensee of WKRR(FM).

The licensee's Annual Employment Reports for the years 1986, 1987 and 1988 reflect that the number of full-time employees was 23 in 1986, 17 in 1987 and 20 in 1988. The number of employees in upper-four job categories was 21 in 1986, 16 in 1987 and 18 in 1988. None of the employees were minorities.

[19] The licensee of WKRR(FM), Asheboro and the licensee of WIVK(AM-FM), Knoxville and WKDA/WKDF-FM, Nashville are separate corporations under common control.

[20] We also conclude that NBMC/NAACP have made no showing that the employment records of WKRR(FM)'s sister stations in Tennessee are relevant. The staff reviewed their EEO records during the processing of the renewal applications of Tennessee radio stations, and took appropriate action based on those records.

[21] We note that the licensee's own exhibit reflects that the unemployment for blacks was nearly twice the overall rate for the area, indicating that blacks were *more* available than whites for *any* job.

[22] In regard to the forfeiture, the licensees may take any of the actions set forth in Seciton 1.80 of the Commission's Rules, as summarized in an attachment to this *Memorandum Opinion and Order and Notices of Apparent Liability*. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[23] Such a list might start:

1. News Director: Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-615

In the Matter of

Amendment of Section 73.202(b), RM-6567
Table of Allotments,
FM Broadcast Stations.
(Summerland Key, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 25, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Summerland Key Communications Partnership (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 137 (1990), proposing the substitution of Channel 273C2 for Channel 275A at Summerland Key, Florida, and the modification of its construction permit (BPH-860703MN) for Station WPIK-FM to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 273C2 for Channel 275A at Summerland Key, Florida, since it could provide that community with its first wide coverage area FM station. Channel 273C2 can be allotted to Summerland Key in compliance with the Commission's minimum distance separation requirements at the site authorized in the construction permit.[1] As requested, we will also modify petitioner's construction permit for Station WPIK to specify operation on Channel 273C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Summerland Key, Florida	273C2

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WPIK, Summerland Key, Florida, IS MODIFIED to specify operation on Channel 273C2 in lieu of Channel 275A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 273C2 are North Latitude 24-40-05 and West Longitude 81-30-05. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-617

In the Matter of

Amendment of Section 73.202(b), RM-6285
Table of Allotments,
FM Broadcast Stations.
(Tavernier, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 25, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Linda U. Kulisky (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 133 (1990), proposing the allotment of Channel 245A to Tavernier, Florida, as that community's first local broadcast service. Petitioner filed comments restating her intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 245A to Tavernier, Florida, as that community's first local broadcast service. Channel 245A can be allotted to Tavernier in compliance with the minimum distance separation requirements of the Commission's Rules.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Tavernier, Florida	245A

4. The window period for filing applications will open on **September 25, 1990,** and close on **October 25, 1990.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 245A are North Latitude 25-00-36 and West Longitude 80-31-06. Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 C.F.R. § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-366

In the Matter of

Amendment of Section 73.202(b), RM-6824
Table of Allotments,
FM Broadcast Stations.
(Knoxville, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of Leighton Enterprises, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6516 (1989), proposing the substitution of Channel 221C3 for Channel 221A at Knoxville, Iowa, and the modification of its license for Station KRLS to specify the higher powered channel. Petitioner states that it will apply for the channel, if allotted.[1] No other comments were received.

2. The petition, as originally filed, was submitted jointly by Dominion Publishing, Inc., licensee of Station KTAV-FM, and Leighton Enterprises, Inc., licensee of Station KRLS. KTAV-FM and KRLS operated as share-time stations. Petitioner states that it has since purchased Station KTAV pursuant to the Commission's grant of the assignment of license application (BALH-891031HU) and that Station KRLS now operates fulltime.

3. We believe the public interest would be served by substituting Channel 221C3 for Channel 221A at Knoxville, Iowa, since it could enable Station KRLS to expand its coverage area. Channel 221C3 can be allotted to Knoxville in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] As proposed, we will also modify petitioner's license for Station KRLS to specify operation on Channel 221C3.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Knoxville, Iowa	221C3

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Leighton Enterprises, Inc. for Station KRLS, Knoxville, Iowa, IS MODIFIED to specify operation on Channel 221C3, in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's late-filed comments were accompanied by a request for acceptance. Petitioner states that it inadvertently failed to timely file supporting comments. However, it contends that no party would be prejudiced by acceptance of the late-filed expression of interest since no opposing comments or counterproposals were filed. We believe that the public interest would be served by their consideration. Therefore, the comments have been accepted for the purpose of expressing continuing interest in the allotment.

[2] The coordinates for this allotment are North Latitude 41-19-12 and West Longitude 93-05-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-127

In the Matter of

Amendment of Section 73.202(b), RM-6673
Table of Allotments,
FM Broadcast Stations.
(Hilo, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. Pursuant to the request of Phillip Lee Brewer (petitioner), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 4824 (1989), proposing the substitution of Channel 250C1 for Channel 250C2 at Hilo, Hawaii, and the modification of his license for Station KKBG to specify operation on the higher class co-channel. Petitioner filed comments restating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 250C1 to Hilo, Hawaii, since it could provide that community with an additional expanded wide coverage area station. Channel 250C1 can be allotted to Hilo in compliance with the minimum distance separation requirements and can be used at Station KKBG(FM)'s present transmitter site.[1] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station KKBG(FM) to specify operation on Channel 250C1.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Hilo, Hawaii	224C1, 234C1, 246C2, 250C1, 262C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station KKBG(FM), Hilo, Hawaii IS MODIFIED, effective **September 24, 1990,** to specify operation on Channel 250C1 in lieu of Channel 250C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit specifying the new channel;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 250C1 at Hilo are North Latitude 19-44-11 and West Longitude 155-01-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-563

In the Matter of

Amendment of Section 73.202(b), RM-6953
Table of Allotments,
FM Broadcast Stations.
(Walsenburg, Colorado)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 8508 (1989), proposing the substitution of Channel 272C3 for Channel 272A at Walsenburg, Colorado, and modification of the license of Hargrave Broadcasting Corporation (petitioner) for Station KSPK(FM), Channel 272A, to specify operation on the higher class channel. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. As indicated in the *Notice*, Channel 272C3 can be allotted to Walsenburg at the petitioner's present transmitter site,[1] in conformity with the minimum distance separation requirements of the Commission's Rules.[2]

3. In consideration of the above, we believe the public interest would be served by substituting Channel 272C3 for Channel 272A at Walsenburg, Colorado, since it could provide the community with its first wide coverage area FM service. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station KSPK(FM) to specify operation on Channel 272C3 in lieu of Channel 272A, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Walsenburg, Colorado	272C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Hargrave Broadcasting Corporation for Station KSPK(FM), IS MODIFIED effective **September 24, 1990,** to specify operation on Channel 272C3 in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the present site of Station KSPK(FM) are 37-37-39 and 104-49-17.

[2] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-565

In the Matter of

Amendment of Section 73.202(b),	RM-6950
Table of Allotments,	
FM Broadcast Stations.	
(Tahoe City, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 4 FCC Rcd 8532 (1989), issued in response to a petition filed on behalf of Mid-South Broadcasting Company (petitioner), licensee of Station KRZQ-FM, Channel 243C2, Tahoe City, California, proposing the substitution of Channel 243C1 for Channel 243C2 and modification of its license to specify operation on the higher power channel. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. As indicated in the *Notice*, Channel 243C1 can be allotted to Tahoe City, California, at the petitioner's suggested site,[1] consistent with the minimum distance separation requirements of the Commission's Rules.[2]

3. In view of the above, we believe the public interest would be served by substituting Channel 243C1 for Channel 243C2 at Tahoe City, California, since it could provide a first expanded coverage FM service to the community. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Mid-South Broadcasting Company, to specify operation on Channel 243C1 in lieu of Channel 243C2, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Tahoe City, California	243C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Mid-South Broadcasting Company for Station KRZQ-FM, IS MODIFIED effective **September 24, 1990,** to specify operation on Channel 243C1 in lieu of Channel 243C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the petitioner's specified site for Channel 243C1 at Tahoe City are 39-16-22 and 119-42-13.

[2] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-346

In the Matter of

Amendment of Section 73.202(b), RM-6742
Table of Allotments,
FM Broadcast Stations.
(Gold Beach, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 26, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. At the request of St. Marie Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6205 (1989), proposing the substitution of Channel 224C1 for Channel 224A at Gold Beach, Oregon, and the modification of its license for Station KGBR(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 224C1, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 224C1 for Channel 224A at Gold Beach, Oregon, since it could enable Station KGBR(FM) to expand its coverage area. Channel 224C1 can be allotted to Gold Beach in compliance with the Commission's minimum distance separation requirements and can be used at the station's present transmitter site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Gold Beach, Oregon	224C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of St. Marie Communications, Inc., for Station KGBR(FM), Gold Beach, Oregon, IS MODIFIED to specify operation on Channel 224C1, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Latitude 42-23-50 and West Longitude 124-21-50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-374

In the Matter of

Amendment of Section 73.202(b), RM-6870
Table of Allotments,
FM Broadcast Stations.
(Leland, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: July 31, 1990; Released: August 10, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6632 (1989), issued in response to a petition filed by Pyramid Communications, Ltd. (petitioner), proposing the substitution of FM Channel 232C3 for Channel 232A at Leland, Michigan. Petitioner also requests modification of its construction permit (BPH-850712XY) to specify operation on Channel 232C3. Petitioner filed comments in which it reaffirmed its interest in the channel.[1]

2. We believe the public interest would be served by the substitution of Channel 232C3 for Channel 232A at Leland, Michigan, since it could provide the community with a wide coverage area station. The channel can be allotted to Leland in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site.[2] Since Leland is located within 320 kilometers (200 miles) of the U.S.- Canadian border, concurrence of the Canadian government has been obtained. We have authorized a modification of petitioner's permit for Channel 232A, Leland, Michigan, to specify operation on Channel 232C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **September 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Leland, Michigan	232C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 232A, Leland, Michigan, IS MODIFIED to specify operation on Channel 232C3 in lieu of Channel 232A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Sonora S. Wray, permittee of Station WSSW(FM), Mackinaw City, Michigan, filed late comments to which petitioner filed a reply. Wray's comments raise the possibility that at some unspecified future date Wray may need to seek an authorization for a transmitter site that might conflict with petitioner's proposed Class C3 operation. In accordance with Section 1.415(d) of the Commission's Rules, we decline to consider further Wray's speculative comments.

[2] The coordinates for Channel 232C3 are 44-51-40 and 85-55-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
RADIO MABLETON LIMITED	File No. BPH-870710MT
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
HAIRSTON BROADCASTING LIMITED PARTNERSHIP	File No. BPH-870710NO
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For Construction Permit for New FM Station, Channel 273A, Mableton, Georgia

ORDER

Adopted: July 27, 1990; Released: August 10, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The record in this case shows that the *Initial Decision* of Administrative Law Judge Walter C. Miller, 5 FCC Rcd 2474 (1990), denied the application of Hairston Broadcasting Limited Partnership and that Hairston Broadcasting did not file exceptions as required by the Commission's rules. Section 1.276(f) provides that: "When any party fails to file exceptions within the specified time to an Initial Decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its application may be dismissed with prejudice for failure to prosecute."

2. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 CFR 1.276(f), the Application of Hairston Broadcasting Limited Partnership (File No. BPH- 870710NO) IS DISMISSED, with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-580

In re Applications of

SAFE BROADCASTING CORPORATION — File No. BPH-871022MC

TRI-STATE BROADCASTING COMPANY — File No. BPH-871023MJ

For Construction Permit for
New FM Station, Channel 239A,
Trion, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: July 19, 1990; Released: August 10, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN. Board Member BLUMENTHAL issuing Concurring Statement.

1. Before the Review Board is the *Initial Decision*, 5 FCC Rcd 381 (1990), of Administrative Law Judge Joseph Chachkin (ALJ), as well as the exceptions and replies filed by both parties. Having heard oral argument on June 20, 1990, and reviewed the record below, the Board is constrained to remand this proceeding to the ALJ for further hearing and the issuance of a *Supplemental Initial Decision*.

2. *Background*: The prevailing applicant below, Tri-State Broadcasting Company (Tri-State), is also the licensee of standard broadcast (AM) facility, WGTA, Summerville, Georgia. At hearing, Tri-State sought to have evidence adduced (under the standard comparative issue) as to its claimed "unusally good" past broadcast record. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398 (1965). In so doing, Tri-State proffered numerous documents claiming that certain programs were purportedly broadcast on WGTA in response to perceived issues and/or problems. However, it is now undisputed that certain of these programs were not, in fact, presented as portrayed.

3. In its Exceptions, Tri-State's competitor, Safe Broadcasting Corporation (Safe), makes the following claims (at paras. 5-10):

> Terry R. Adams, Safe's owner, personally visited the studios of Tri-State's WGTA(AM), located in Summerville, Georgia, on February 6, 1989, so as to inspect WGTA's public inspection file . . . . Upon his arrival at WGTA, Mr. Adams spoke with the station's program director, Ms. Margaret Dillard, and requested to see the station's quarterly issues/programs lists. Ms. Dillard responded that she knew nothing of such lists and that only Tri-State's owner, William Farrar, maintained the lists.
>
> Later that day, Adams met with Farrar . . . . Farrar provided Adams with a copy of WGTA's quarterly issues/programs lists. Thereafter, on February 22, 1989, both Safe and Tri-State filed their respective threshold showings . . . . Significantly, Safe's threshold showing made specific reference to the fact that WGTA's quarterly issues/programs lists filed by Tri-State in support of its own threshold showing were nothing more than photocopies of a much earlier lists, with only the dates changed to make each list appear timely . . . . Meanwhile, Safe learned that certain programs described in several of WGTA's lists had in fact not been broadcast, or even produced by the supplier of the programs for some time. Upon confirmation of the above, Safe sought enlargement of issues against Tri-State on May 5, 1989.
>
> * * *
>
> Tri-State opposed Safe's petition on May 17, 1989. Therein for the very first time, Tri-State admitted that the programs previously referenced by Safe had in fact been discontinued and had been "erroneously recorded in subsequent quarterly issues/programs lists." In defense of its action, Tri-State represented that its "errors" had been "negligent" and were due to mistakes made by the station's program director, who stated (under oath) that it had been *her* job to prepare the quarterly lists and that she had developed a "habit of using the previous quarterly programs issues list (sic) to prepare the new list." Tri-State's owner, William Farrar, also provided a sworn statement, which stated that, while he had reviewed the lists "prior to their insertion in the public file," he had simply "overlooked" the listings of the discontinued programs, and had since discussed the matter with Ms. Dillard, the station's program director, instructing her to, henceforth, prepare all lists solely from an examination of WGTA's daily program logs . . . .
>
> Nevertheless, during preliminary comments before hearing evidence as to the standard comparative issue on the date for hearing, July 5, 1989, the Presiding Judge denied Safe's petition, holding that the "dereliction, while inexcusable, was not the result of intentional deception" (Tr. 15). This conclusion was based on Tri-State's assertion that program logs maintained by WGTA (which had not been kept in the station's public inspection file or otherwise made available to the public by WGTA; indeed they are no longer required by the Commission) accurately reflected that programs claimed to have been broadcast were in fact not carried by WGTA.

Thus, Safe argues that two specific programs included in Tri-State's "issues/programs" lists, and purportedly broadcast on WGTA *every week* in each calendar quarter of 1987 and 1988 ("Prime Time" and "University of Georgia Almanac"), were not, in fact, so broadcast. Tri-State's Reply does not materially dispute these factual assertions; and, at oral argument, Tri-State's counsel candidly con-

ceded that the "issues/programs" lists in question were not accurate as to actual programs broadcast. Again, Tri-State's counsel claimed that these inaccuracies were "error" (Tr. 126).

4. Safe also sought an issue below pertaining to Tri-State's preparation of its "issues/programs" lists contained in the public file at WGTA, and our independent review of the record reveals significant questions with respect to this matter. On February 22, 1989, Tri-State filed its several hundred-page document (styled "Threshold Showing of Unusually Good Past Broadcast Record of Tri-State . . . .") Appended thereto were copies of fourteen days of program logs for WGTA (for the weeks of March 10-16, 1985, and October 26-November 1, 1986), eighteen "Quarterly Issues/Programs" lists (for those quarters between December 1, 1983 and December 31, 1988), as well as eight discrete lists entitled "Significant Problems and Needs of Chattooga County" (generally compiled on an annual basis between December 1, 1975 and December 1, 1983).

5. On each of the "quarterly" lists, the issues were *identical*, unchanged, and listed *seriatim* as follows: (1) "Unemployment;" (2) "Courts and Law Enforcement;" (3) "Medical and Health Needs;" (4) "Educational Needs; (5) "Recreational Needs;" (6) "Improved Local Government;" (7) "The Drug Problems;" (8) "Social Service;" (9) "Religious Needs;" (10) "Senior Citizens Needs;" and, (11) "Veterans Needs." That is, the "issues" perceived for more than five consecutive years (between December 1, 1983 and December 31, 1988), did not change one iota, except for an [1]*identical* error recurring in the four "quarterly" lists encompassing the period between December 1, 1983 and March 31, 1985. Specifically, while the problems in those lists were sequentially numbered "1" through "11", issue number "5" was omitted on each document. That is, the lists of issues are identical to those described, except that Issue 5 did not appear on these four consecutive lists. On the "quarterly" list dated April 1, 1985 to June 30, 1985, Issue 5 is written in by hand, and is disclosed (again) as "Recreational Needs." Further, we note that the three "quarterly" lists (all apparently typed on the same unique typewriter) for July 1, 1985 to September 30, 1985, January 1, 1986 to March 31, 1986, and April 1, 1986 to June 30, 1986, all contain yet another *identical* error: "Issue 9: Religiour [sic] Needs." In fact, these three "quarterly" lists appear to be no more than photocopies of the previous list, with only the dates changed.

6. Safe thus urges that Tri-State's own documents demonstrate that it did not, in good faith, compile these "issues/programs" lists, but instead merely copied them (errors and all) from one time period to the next, and then had the temerity to seek extra credit for an "unusually good" broadcast record, based, in part, on programs it had discontinued long ago. Safe therefore claims that the ALJ's failure to add requested issues in this regard was error. Indeed, we note that at no time in this proceeding (including either in response to Safe's Motion to Enlarge Issues dated May 5, 1989, or even in its Reply Exceptions) has Tri-State ever addressed the questions raised concerning the preparation and maintenance of its "issues and programs" lists. [2]

7. *Discussion*: The Commission now requires very little record-keeping of its licensees. However, the preparation and maintenance of "issues/programs" lists for inclusion in the station's public inspection file remains a minimal requirement for operating in the public interest. *See Deregulation of Radio (Report and Order)*, 84 FCC 2d 968 (1981), *recon. granted in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part sub nom. Office of Communications of United Church of Christ v. FCC*, 707 F. 2d 1413 (D.C. Cir. 1983); *Deregulation of Radio (Second Report and Order)*, 96 FCC 2d 930 (1984), *reversed and remanded Office of Communications of United Church of Christ v. FCC*, 779 F. 2d 702 (D.C. Cir. 1985); *Deregulation of Radio*, 104 FCC 2d 505 (1986). *See also Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126 (Rev. Bd. 1987), *aff'd* , 4 FCC Rcd 2553 (1989), *recon. denied*, 4 FCC Rcd 6312 (1989) (renewal of license denied where, *inter alia*, licensee deceived as to "issues/programs" lists).

8. The applicable provisions of the Commission's Rules evolved as follows: In its *Second Report and Order*, 96 FCC 2d at 945, the Commission amended 47 CFR § 73.3526(a)(14) to provide that the local public inspection file contain:

> For AM and FM broadcast stations every three months a list of at least 5 to 10 community issues addressed by the station's programming during the preceding 3 month period. The list is to be filed the first day of each calendar quarter (*e.g.*, July 1, October 1, January 1 and April 1). The list shall include a brief narrative describing how each issue was treated, *i.e.*, public service announcements or programs, giving a description of the programs including time, date and duration of each program. These lists are to be retained for the entire license renewal period.

However, the court vacated the *Second Report and Order* in its 1985 *United Church of Christ* decision, *supra*, and 47 CFR § 73.3526(a)(9) was subsequently amended to provide that the local public inspection file contain:

> For commercial AM and FM broadcast stations, every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period. The list for each calendar quarter is to be filed by the tenth day of the succeeding calendar quarter (*e.g.*, January 10 for the quarter October-December, April 10 for the quarter January-March, etc.). The list shall include a brief narrative describing what issues were given significant treatment and the programming that provided this treatment. The description of the programs should include, but is not limited to, the time, date, duration and title of each program in which the issue was treated.

9. Under the facts and circumstances present here, including (1) Tri-State's concession that certain listed programs were not, in fact, broadcast for over two years, (2) the *seriatim* listing of the nine most significant issues, which remained identical and unchanged for more than ten consecutive years (*see supra* para. 5 and note 1), and eleven such issues for a period of more than five years, as well as (3) the apparent conflict in the statements of Farrar and Dillard as to who actually prepared, and was responsible for, the WGTA "issues/programs" lists, we find that substantial and material questions of fact are raised concerning Tri-State's compliance with 47 CFR § 73.3526. The evidence concurrently raises questions as to

Tri-State's representations of programs broadcast to meet local issues and problems. Tri-State is already a Commission licensee, and the Commission's *Policy Regarding Character Qualifications in Broadcasting Licensing ("Character Policy Statement")*, 102 FCC 2d 1179, 1191 (1986), mandates that compliance with FCC Rules will bear on basic qualifications. Because "the trait of 'truthfulness' is one of the key elements of character necessary to operate a broadcast station in the public interest," *Character Policy Statement*, 102 FCC 2d at 1210, the further evidentiary hearing we are ordering here is necessary. *See San Joaquin Television Improvement Corporation*, 2 FCC Rcd 7004, 7007 (1987).

10. ACCORDINGLY, IT IS ORDERED, That this proceeding is remanded to the presiding ALJ for further hearing and the preparation of a *Supplemental Initial Decision* on the following issues:

1. To determine whether Tri-State Broadcasting Company has properly prepared and maintained its local public inspection file pursuant to 47 CFR § 73.3526, and the effect thereof on that applicant's basic qualifications to be a Commission licensee; and,

2. To determine whether Tri-State Broadcasting Company intentionally made misrepresentations to the Commission and/or the general public by the submission of (or the placement in the WGTA local public inspection file) its "issues/programs" lists, and the effect thereof on that applicant's basic qualifications to be a Commission licensee.

11. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence on these issues SHALL BE on Safe Broadcasting Corporation, and the burden of proof SHALL BE on Tri-State Broadcasting Company.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Additionally, the annual "problems and needs" list for the period December 1, 1982 to December 1, 1983 is also identical to those described in text. The two annual lists submitted by Tri-State for the period between December 1, 1980 and December 1, 1982 are also identical to these "quarterly" lists, except "Issue 11" (consistently repeated on later lists as "Veterans Needs") is not included; the two "annual" lists for the period between November 15, 1978 and December 1, 1980 are similarly identical, except Issues "10" and "11 are not included.

[2] While formal ascertainment of issues is no longer required, *see Deregulation of Radio*, 84 FCC 2d at 971, licensees are still obligated to determine local needs and issues, but "may do so by any means reasonably calculated to apprise them of the issues." *Id.* Manifestly, this requirement does not intend the mere copying of the previous list of issues, *sans* any serious and reasonable effort to periodically determine local needs and problems.

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

Section 73.3526 of the rules requires a licensee to compile a quarter-annual list of "the station's most significant treatment of community issues during the preceding three month period."

But the evidence proffered by Tri-State, voluntarily and in support of a "superior" rating, strongly suggests that, for at least five years ('83-'88), the licensee merely copied (photocopied?) its prior list (mistakes and all in some cases), even to the point of listing programs that had been discontinued years before. The exceptor here had demanded an issue, but was unsuccessful.

At oral argument, Tri-State counsel suggested that the lists resulted from licensee "error." While the listing of discontinued programs might be explained by inattention, it is difficult to envisage *a priori* just what sort of "error," if any, might have attended at least five years worth of (virtually) identical quarterly lists.

Perhaps the licensee can explain these curious circumstances; but in the face of demonstrative evidence raising *prima facie* and utterly unanswered questions as to good faith compliance with Section 73.3526, we simply have no alternative but to remand for an answer, and cannot allow the case to advance in the present state of the record. *See WCVQ, Inc.*, FCC 90-224, released June 26, 1990 (Comm'n remands for further evidence on applicant honesty).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition of XAVIER UNIVERSITY,

Licensee of Noncommercial
Radio Station WVXU(FM),
Cincinnati, OH

for Reconsideration of
Letter of Admonition

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1990; Released: March 30, 1990

By the Commission:

1. The Commission has under consideration: (1) a letter of admonition to Xavier University ("Xavier"), licensee of noncommercial radio station WVXU(FM), Cincinnati, OH, issued November 14, 1989, by the Chief, Complaints and Investigations Branch, Enforcement Division, Mass Media Bureau, for apparent violations of Section 73.503(d) of the Commission's Rules and Section 399B of the Communications Act of 1934, as amended; and (2) Xavier's petition for reconsideration dated December 11, 1989, requesting that the admonition be rescinded and that the station's files be cleared of any adverse action in regard to the underwriting credits at issue therein. The Mass Media Bureau has referred the petition to the Commission for action pursuant to Section 1.104 of the Commission's Rules.

2. The letter of admonition (LOA) was issued as a result of an August 23, 1989, complaint alleging that WVXU(FM) had been airing advertisements or promotional material inappropriate for broadcast on a noncommercial station. As examples, the complainant submitted audio tapes containing the six specific announcements cited in the LOA and demonstrating that WVXU(FM) had broadcast them during its "Morning Edition" program between 7:00 a.m. and 9:00 a.m. on various days in August 1989.

3. The LOA determined that the following material from six of WVXU(FM)'s announcements was inconsistent with the requirements of Section 73.503(d)[1] of the Commission's Rules and Section 399B of the Communications Act.[2]

> -- "This WVXU traffic watch update is brought to you by Jiffy Lube now offering a discount on air conditioner recharge with a Penzoil oil change and 14-point lube check."
>
> -- "Morning Edition is brought to you in part by Ametury (sic) and Associates offering creative services for advertising, marketing and training."
>
> -- "The Choice is Yours is pleased to sponsor programming on WVXU. A health food store and restaurant. The Choice is Yours is located at 821 Delta, on Mount Lookout Square . . . . Fresh and original foods are the specialty."
>
> -- "Programming on WVXU is made possible in part by the new Meritan Gallery . . . featuring art expressing timeless traditional truths in contemporary visual vocabulary."
>
> -- "Morning Edition is made possible in part by a grant from Arthur Anderson and Company and Anderson Consulting, serving accounting and audit, tax and management information consulting needs for over 75 years."
>
> -- "Morning Edition is made possible in part by Strauss and Troy, a Cincinnati based law firm in its 36th year."

The LOA found that the word "discount" was comparative and provided price information, that the words "creative," "fresh and original," and those describing the Meritan Gallery's art, were qualitative and promotional in the context of the foregoing announcements, and that specifying a company's number of years in business was qualitative and impliedly comparative.

4. Xavier argues that any sanctions are unwarranted in the above cases. It explains that, shortly after the subject Jiffy Lube announcement was aired (in August), it determined that the language in the announcement (created by "the Traffic Watch") exceeded station underwriting policies and it discontinued such broadcast. Moreover, Xavier instituted a policy requiring that Traffic Watch provide advance FAX notification of any tag lines for review by station personnel, and in September 1989 a four-member underwriting screening committee began to review the FAX submissions on a daily basis. Because of the isolated nature of the infraction as well as the prompt and effective corrective action, all of which occurred well before the initiation of any Commission action, the licensee asks that the admonition be rescinded with respect to this violation.

5. Further, Xavier explains its reasoning in concluding that the phrasing in the other five announcements was within the bounds of our rules and policies governing underwriting credits on noncommercial broadcast stations. For example, regarding the description of Amateuli & Associates' product or service listing, Xavier states that Amateuli offers "creative services for advertising, marketing, and training" in the sense of "creating original material for their clients," "creative material" being the stock in trade of all ad agencies. Mention of the health food store/restaurant's "fresh and original foods," the licensee argues, is a statement identifying a product offered by the underwriter, comparable to "French food, or homemade food, or fast food," and describes the underwriter's practice of bringing in foods "right from the farm" and creating "its own totally original menu entrees." Reference to the longevity of business underwriters, the licensee maintains, describes what the firms have to offer in the way of experience and is not necessarily qualitative, a belief further bolstered by informal opinions it claims to have received from Commission personnel. Xavier urges that its reasonable, good faith judgments in these situations,

rather than fine semantic distinctions, should be given more weight and that the admonition should be rescinded.

6. As the Commission stated in *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations*, 90 FCC 2d 895 (1982), "We recognize that it may be difficult to distinguish at times between announcements that promote and those that identify. We only expect our public broadcast licensees to exercise their reasonable, good faith judgments in this regard." [3] We are persuaded that the language at issue in the latter five announcements listed at Paragraph 3, above, is not clearly promotional as opposed to identifying and that the licensee exercised reasonable, good faith judgment regarding the language in the five disputed announcements describing its underwriters' product lines and services. Accordingly, we find that the broadcast of these announcements is not a violation of Section 73.503(d) of the Commission's Rules or Section 399B of the Communications Act, and that no sanction should have been issued.

7. With respect to the other announcement, which mentioned a discount being offered by Jiffy Lube, the underwriter, we find that under the totality of circumstances WVXU should not be admonished. In this case, the licensee immediately took action to correct this isolated lapse well before the Commission issued the LOA. Such action included deleting the questionable announcement and instituting review procedures to prevent airing similar announcements in the future. Moreover, although the announcement appears to cross the line established by our rules, it certainly is not as egregious as the promotional announcements that triggered previous enforcement actions. *See e.g., Public Notice*. "In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," FCC 86-161 at 5 n.3, April 11, 1986.

8. In light of the foregoing, we believe it appropriate to rescind the November 14, 1989, letter of admonition. Accordingly, the subject petition for reconsideration filed by Xavier University on December 11, 1989, IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Each [noncommercial educational FM broadcast] station shall furnish a nonprofit and noncommercial broadcast service. . . . No *promotional* announcement *on behalf of for profit entities* shall be broadcast at any time in exchange for the receipt, in whole or in part, of consideration to the licensee, its principals, or employees. . . .

47 C.F.R. § 73.503(d).

[2] (a) For purposes of this section, the term "advertisement" means any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended . . . to promote any service, facility, or product offered by any person who is engaged in such offering for profit; . . . .

* * *

(b)(2) No public broadcast station may make its facilities available to any person for the broadcasting of any advertisement.

47 U.S.C. § 399B.

[3] 90 FCC 2d at 911. *See also Public Notice*, "In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," FCC 86-161, April 11, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-263

In the Matter of

Amendment of Section 73.3525 of the
Commission's Rules Regarding
Settlement Agreements Among Applicants
for Construction Permits

ORDER

Adopted: August 7, 1990; Released: August 7, 1990

By the Chief, Mass Media Bureau:

1. On July 19, 1990, the Federal Communications Bar Association ("FCBA") filed a motion for extension of time, requesting an extension of 32 days within which to file comments in the above-captioned proceeding. In support of its request, the FCBA states that "it will be difficult, if not impossible" for it to develop the consensus of its membership necessary to prepare its comments by the current August 23, 1990, deadline for filing comments in this proceeding.

2. In establishing the comment dates in this proceeding, the Commission stated that "[e]xtensions of these time periods are not contemplated." However, as noted by the General Counsel in granting a similar and related request in Gen. Docket No. 90-264, that admonition must be balanced against the expected value of the FCBA's comments and the organization's need to develop a consensus of its membership. Under these circumstances, we believe that the public interest will be served by extending the comment period to September 14, 1990.

3. Accordingly, IT IS ORDERED, that the "Motion for Extension of Time" filed by the Federal Communications Bar Association IS GRANTED to the extent indicated above.

4. IT IS FURTHER ORDERED, that the time for filing Comments in this proceeding IS EXTENDED until September 14, 1990. Reply Comments will be due by October 15, 1990.

5. This action is taken pursuant to authority found in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, and delegated in Sections 0.204 and 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-327

In the Matter of

AT&T COMMUNICATIONS — Transmittal No. 2282

Revisions to Tariff F.C.C. No. 15

Competitive Pricing Plan 6 - -
East Ohio Gas Company and Swift Global Communications, Inc.

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1990; Released: August 6, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 9, 1990, AT&T filed Transmittal No. 2282 to introduce its sixth Competitive Pricing Plan (CPP6) under AT&T Tariff F.C.C. No. 15. Transmittal 2282 is scheduled to become effective August 7, 1990. CPP6 offers a one-time credit in the amount of $7,500 to East Ohio Gas Company (East Ohio) and Swift Global Communications, Inc. (Swift) if those customers order new or additional AT&T MEGACOM Service under a three-year service term. AT&T claims that CPP6 is also available to other customers who order new or additional AT&T MEGACOM Service under a three-year term and who certify that they received, on or after October 19, 1989, from another interexchange carrier, an offer of a $7,500 credit against similar outbound services. MCI Telecommunications Corporation (MCI) and National Telecommunications Network (NTN) filed petitions to reject AT&T's transmittal. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate.[1] For the reasons set forth below, we suspend Transmittal 2282 for the full five-month statutory period.

II. BACKGROUND

2. The Commission has previously considered the lawfulness of an AT&T Tariff 15 offering of Competitive Pricing Plans. In 1988, AT&T filed its first competitive pricing plan for the Holiday Corporation.[2] AT&T had developed the Holiday Rate Plan (HRP) in response to MCI's offer of discounted service to the Holiday Corporation. The Commission initiated an investigation to determine whether HRP was unjustly and unreasonably discriminatory in violation of Section 202(a) of the Communications Act, and whether HRP was justified under the competitive necessity doctrine. [3] In the *HRP Final Order*, the Commission found that, even assuming that the competitive necessity defense can justify a single customer offering, that defense could not justify retention of the HRP discount.[4] The Commission concluded that HRP was unreasonably discriminatory and ordered AT&T to file corrective tariff revisions.

3. In 1989, AT&T filed its second Competitive Pricing Plan (CPP2) for Resort Condominiums International (RCI) in response to MCI's offer of discounted service to RCI.[5] On January 19, 1990, the Common Carrier Bureau (Bureau) suspended CPP2 for the full five-month statutory period and initiated an investigation to determine, *inter alia*, whether CPP2 violates the Communications Act prohibition against unreasonable discrimination.[6] Recently, the Bureau suspended AT&T's fourth competitive pricing plan for CBS, Inc. until November 26, 1990, and suspended AT&T's fifth competitive pricing plan for La Quinta Motor Inns, Inc. until December 15, 1990.[7]

4. In the instant transmittal, AT&T attempts to establish an offering in Tariff 15 for East Ohio, Swift, and Overseas Military Sales Group.[8] East Ohio generates approximately 500,400 minutes of interstate traffic annually. Swift and Overseas generate 1.187 million minutes of interstate traffic annually. AT&T Description and Justification at App. A, App. B. AT&T is currently the principal provider of interexchange telecommunications service to Swift and Overseas. *Id.* at 12. According to AT&T, Swift and Overseas recently received proposals from Sprint that include a one-time credit of $7,500 for purchasing Sprint's outbound calling service that requires the use of high-capacity DS1 special access (Ultra WATS). It is AT&T's understanding that although the Sprint offer is based generally on its tariffed services, the credit is not included in Sprint's tariff and has been made available only to Swift and Overseas. *Id.* at App. B. AT&T contends that East Ohio recently received a proposal from MCI that includes a one-time credit of $7,500 for purchasing MCI's outbound calling service that requires the use of high-capacity DS1 special access (Prism I).[9] It is AT&T's understanding that although the MCI offer is based generally on its tariffed services, the credit is not included in MCI's tariff and has been made available only to East Ohio. *Id.* at App. A.

5. According to AT&T, East Ohio, Swift, and Overseas would choose AT&T if CPP6 were available. AT&T states that each said it would use the services of MCI or Sprint if AT&T does not respond with a credit comparable to that offered by those carriers. AT&T claims that CPP6 provides a one-time $7,500 credit to enable AT&T to remain competitive. According to AT&T, CPP6 offers the credit to East Ohio, Swift, Overseas, and other customers with a substantially similar offer from a competing interexchange carrier. CPP6 also contains a three-year term commitment, although AT&T states that its competitors do not always include a term commitment in their offers. This, according to AT&T, ensures that the CPP6 terms are no more favorable than those of the MCI or Sprint offers. *Id.* at App. A, App. B.

6. AT&T contends that CPP6 is justified under the doctrine of "competitive necessity" and satisfies the net revenue test. *Id.* at 2-3. AT&T states that CPP6 is justified under the competitive necessity standard because: (1) an equal or lower priced competitive alternative -- *i.e.*, a similar offering or set of offerings from other carriers -- is available to the customer of the discounted offering; (2) the terms of the discounted offering are reasonably designed to meet that competitive alternative without undue

discrimination; and (3) the discount contributes to reasonable rates and efficient services for all users.[10] AT&T asserts that other than the $7,500 credit, standard tariffed rates are being offered by MCI, Sprint, and AT&T. Based upon its own calculations, AT&T states that in all cases, therefore, its rates will exceed those offered by MCI and Sprint. Thus, AT&T concludes, these customers have been offered an alternative to AT&T's services at an equal or lower rate and have satisfied the first element of the competitive necessity test. *Id.* at 7-8. With regard to the second element, AT&T maintains that CPP6 is narrowly tailored to meet competition without undue discrimination because it is available to any customer which can demonstrate that it has received a substantially similar off-tariff offer from MCI or Sprint. Finally, AT&T argues that by enabling AT&T to retain usage and revenues that would otherwise be lost to competition, CPP6 will benefit all customers through improved earnings. *Id.* at 6-10.

III. PLEADINGS

A. Petitions

7. MCI maintains that CPP6 is unlawful for the same reasons as HRP, CPP2, CPP3, CPP4, and CPP5, and incorporates by reference its comments in those proceedings. MCI Petition at 3. In addition, MCI denies making the offer alleged by AT&T to have been made to East Ohio since March 1990. MCI contends that the offer was communicated to East Ohio during the earlier time period when the $7,500 promotional offering was tariffed and in effect. MCI questions AT&T's affidavit to the contrary, observing that its categorization of East Ohio as a high volume user who would choose AT&T over MCI is "remarkable." *Id.* at 4-5. MCI further argues that AT&T's tariff language is unlawfully vague, failing to specify how a customer would certify that it had received an offer from a competing carrier. Finally, MCI contends that AT&T cannot satisfy the competitive necessity test in this instance because AT&T is not even the provider of the services for which it is competing. MCI maintains that Allnet Communication Services, Inc., currently serves East Ohio. *Id.* at 5-7. It concludes that the Commission should require AT&T to either withdraw CPP6 or broaden the offer to one that is truly generally available. *Id.* at 8-9.

8. Sprint maintains that CPP6 suffers from all of the same defects as AT&T's earlier Tariff 15 filings and incorporates by reference its comments in the earlier proceedings. Sprint Petition at 2. In addition, Sprint says that its preliminary inquiries reveal that its offer to Swift was in response to an AT&T offer. In any case, Sprint states that Swift is no longer interested in obtaining Sprint service due to technical considerations. *Id.* at 2-3. Sprint argues that CPP6 is inherently discriminatory because AT&T has simply transferred the generally available AT&T Tariff 1 promotional offering of $7,500 to Tariff 15. *Id.* at 3. Finally, Sprint alleges that the general availability clause in CPP6 does not prevent discrimination. According to Sprint, this AT&T tariff still allows discrimination between customers with identical usage patterns depending on whether they have received competing offers. Sprint says that the Commission has already twice found this type of clause to be inadequate. *Id.* at 4-5.

9. NTN incorporates by reference its comments in the earlier Tariff 15 proceedings. It argues that AT&T's Tariff 15 filings constitute unlawful, discriminatory target pricing. In its opinion, existing law does not permit AT&T to elude the Commission's prohibition against discriminatory pricing through claims of competitive necessity. NTN Petition at 1-3.

B. Reply

10. AT&T notes that the petitioners have merely reiterated or incorporated by reference generalized arguments raised in connection with previous Tariff 15 filings. It maintains that it has previously demonstrated that these claims are without merit. AT&T Reply at 1-2. With respect to MCI's allegation that it has misprepresented MCI's offer to East Ohio, AT&T contends that MCI's claim is false and AT&T provides two supporting letters allegedly from East Ohio. *Id.* at 2-3. AT&T further alleges that whether Sprint's offer was made in response to an AT&T offer is immaterial, especially since Sprint's offer was made after the AT&T offer expired. AT&T also notes that Sprint does not dispute the facts concerning the Overseas offer. *Id.* at 3-4.

11. AT&T further maintains that the Communications Act does not distinguish between single customer offerings of dominant and non-dominant carriers. Moreover, says AT&T, the competitive necessity doctrine is not limited to retention of existing customers and precedent supports using that doctrine to justify offers to new customers. *Id.* at 5-6. Finally, AT&T repeats its arguments that its Tariff 15 offerings are not unreasonably discriminatory because such offerings are available to any customer with a substantially similar offer from a competing interexchange carrier, and that the general availability provision is not vague. *Id.* at 7.

IV. DISCUSSION

12. We conclude, based on our review of the instant transmittal and the pleadings, that AT&T's offering raises significant issues that warrant investigation. Single-customer offerings raise serious questions of compliance with the Communications Act prohibition against unreasonable discrimination. Yet, as the Commission observed at the time it initiated its investigation of the Holiday Rate Plan, "[l]egal precedent supports the view that otherwise discriminatory rates can be reasonable where justified by competitive necessity."[11] Determining whether AT&T may properly rely upon competitive necessity in this instance, however, requires further analysis and additional information from interested parties.

13. We also conclude that the issues raised by this transmittal warrant exercise of our discretion to suspend the transmittal pending investigation. We recognize that suspension is a severe regulatory action because it delays the implementation of new service offerings. In deciding whether to suspend, we must balance the interests of ratepayers, the filing carrier, and the competitive process. On balance, we have decided that the potential for a violation of Section 202(a) of the Communications Act by the instant transmittal, and consequently the potential for harm to other ratepayers, outweighs the negative impact upon AT&T. Therefore, we conclude that the Commission's preference for avoiding unnecessary disruption of the competitive balance in the marketplace does not require that we refrain from suspending this transmittal.

14. We will incorporate this investigation into the proceeding established in CC Docket No. 90-327. We will designate the issues to be examined in this investigation in a future Order.

V. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Sections 204(a) and 403 of the Communications Act of 1934, 47 U.S.C. §§ 204(a), 403, an investigation IS INSTITUTED into the lawfulness of the tariff revisions filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal No. 2282.

16. IT IS FURTHER ORDERED that this investigation IS INCORPORATED into the proceeding established in CC Docket No. 90-327.

17. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the instant tariff revisions filed by AT&T Communications ARE SUSPENDED until December 31, 1990.

18. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this suspension no later than five business days from the release of this Order. Special Permission No. 90-712 is assigned for this purpose.

19. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal No. 2282 filed by MCI Telecommunications Corporation and National Telecommunications Network ARE DENIED.

20. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 2282 filed by US Sprint Communications Company Limited Partnership IS GRANTED to the extent indicated herein and otherwise IS DENIED.

21. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] In addition to these pleadings, MCI addressed a letter to the Chief, Common Carrier Bureau concerning matters disputed in this proceeding. We did not consider this letter in the instant Order. No party is disadvantaged by this treatment because our investigation of the transmittal will give MCI an opportunity to introduce properly into the record the information and arguments in its letter.

[2] AT&T's first Competitive Pricing Plan, the Holiday Rate Plan, was introduced in tariff revisions filed May 9, 1988, under Transmittal No. 1215.

[3] *See* AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7712 (1988) (*HRP Investigation Order).*

[4] AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7933, 7934 (1989) (*HRP Final Order), recon. denied*, 5 FCC Rcd 1821 (1990).

[5] CPP2 was introduced in tariff revisions filed October 23, 1989, under Transmittal No. 1854. On November 6, 1989, AT&T filed amendments to CPP2 under Transmittal No. 1883.

[6] AT&T Communications, Inc., CC Docket No. 90-11, Memorandum Opinion and Order, 5 FCC Rcd 2171 (Com.Car.Bur. 1990). Transmittal 1854 became effective June 21, 1990, but is still subject to investigation.

[7] AT&T Communications Tr. No. 2185, CC Docket No. 90-327, DA 90-874, rel. June 25, 1990; AT&T Communications Tr. No. 2233, CC Docket No. 90-327, DA 90-955, rel. July 13, 1990.

[8] While Overseas Military Sales Group is discussed in the Transmittal 2282 Description and Justification, it is not listed in the tariff as a customer for CPP6.

[9] AT&T explains that prior to October 1989, a general promotional offering was available from each of the interexchange carriers. The promotion included a one-time credit of $7,500. AT&T says that CPP6 responds to offers of MCI and Sprint after the close of that promotion.

[10] *See also* Private Line Rate Structure and Volume Discount Practices, Memorandum Opinion and Order, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984).

[11] *HRP Investigation Order,* 4 FCC Rcd at 7713.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-64

In the Matter of

Regulations Concerning Indecent
Communications by Telephone

REPORT AND ORDER

Adopted: June 14, 1990; Released: June 29, 1990

By the Commission:

I. INTRODUCTION

1. By a Notice of Proposed Rule Making in *Regulations Concerning Indecent Communications by Telephone*, GEN. Docket No. 90-64 (*NPRM*), 5 FCC Rcd 1011 (1990), the Commission sought public comment on proposed regulations to be adopted pursuant to Section 223 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 223.[1] Section 223, *inter alia*, imposes penalties on those who knowingly make obscene communications by telephone for commercial purposes and on those who knowingly make available indecent communications by telephone for commercial purposes to persons under 18 years of age or to adults without their consent. The section establishes that it is a defense to prosecution for the defendant to restrict access to the prohibited indecent communications to persons eighteen years of age or older by complying with such procedures as the Commission may prescribe by regulation.[2] The statute also requires telephone companies, to the extent technically feasible, to prohibit access to indecent communications from the telephone of a subscriber who has not previously requested access in writing. [3]

2. Comments on the proposed regulations were due on or before March 2, 1990, and reply comments were due on or before March 13, 1990.[4] In this decision we review the proposed rules and comments submitted in response to the notice of proposed Rule Making and adopt final rules under Part 64 to establish defenses to prosecution under Section 223(b).[5] These rules provide that in order to establish a defense to prosecution under Section 223 of the Act, adult information service providers are required to utilize credit card authorization, access codes, or scrambling in order to limit access to consenting adults over the age of eighteen.[6] In addition, adult information service providers are required to notify carriers identified in Section 223(c)(1) of the Act that they are providing the kind of service described in Section 223(b) of the Act.[7] Where the providers subscribe to mass announcement services tariffed at this Commission, they must request of the carriers in writing that calls to the message services be subject to billing notification as adult message services. Finally, we codify that a common carrier shall not provide access to a communication specified in Section 223(b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication.[8] These regulations are promulgated pursuant to the Congressional mandate in Section 223 and are a necessary underpinning of the statutory scheme, which imposes penalties for violations of the statutory and regulatory provisions.

II. BACKGROUND

3. Congress initially sought to restrict children's access to indecent commercial telephone services in 1983. P.L. 98-214, 97 Stat. 1469 (December 8, 1983). Pursuant to the directive contained in that statute, the Commission has attempted to restrict access to adult message services on three occasions. In the *First Report and Order*, Gen. Docket No. 83-989, 49 Fed. Reg. 24,996 (1984), the Commission determined that the adult message provider would have a defense to prosecution if it operated only between the hours of 9:00 p.m. and 8:00 a.m., or required payment by credit card prior to transmission of the message. The court invalidated this time of day restriction in *Carlin Communications, Inc. v. FCC* (*Carlin I*), 749 F.2d 113 (2d Cir. 1984), finding that the Commission had rejected alternatives that might be as effective and less restrictive.

4. The Commission proposed new alternatives and, in its *Second Report and Order*, 50 Fed. Reg. 42,699 (1985), concluded that the most effective means of restricting access by minors to adult message services, while at the same time minimizing restrictions on the rights of adults, was to require message providers to transmit messages only to callers using an access code or personal identification number available only to adults, or to require payment by credit card before transmission of the adult message.[9] On appeal, the court stated that it was "not yet convinced that the regulation was chosen with the appropriate constitutional strictures in mind . . . ." *Carlin Communications, Inc. v. FCC* (*Carlin II*), 787 F.2d 846, 847 (2d Cir. 1986). The court further stated that the access code regulation was clearly arbitrary and capricious with respect to areas served by New York Telephone because the public announcement system provided by that carrier was a one-way, non-interactive system, making it infeasible to implement an access code system. The court stated that its decision applied only to Carlin and the New York Telephone system. The access code regulation was therefore left in effect in other areas of the country.[10]

5. In response to *Carlin II*, the Commission promulgated new rules in its *Third Report and Order*, 52 Fed. Reg. 17,760 (1987), adding message scrambling to the prior defenses of credit card payment and use of access codes. Under this arrangement, adult program providers would scramble their messages; sales of decoders could be limited by state law to adults. Adult program providers offering adult message services using mass announcement services tariffed at the FCC were required to request that carriers providing such services identify calls in bills to customers. In *Carlin Communications Inc. v. FCC* (*Carlin III*), 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S., 109 S. Ct. 305, 102 L.Ed 2d 324 (1988), the court held that the new regulations, which included access codes, credit card payments and scrambled messages as defenses to prosecution under Section 223(b) for dial-a-porn providers, were a "feasible and effective way to serve" the "compelling state interest" in protecting minors. 837 F.2d at 555. The court directed the Commission to reopen proceedings if a

less restrictive technology became available. However, the court held that Section 223(b) could not constitutionally be applied to nonobscene speech. *Id.* at 560, 561.[11]

6. Congress then amended Section 223(b) of the Act to prohibit indecent as well as obscene interstate commercial telephone communications directed to any person regardless of age.[12] In *Sable Communications of California, Inc. v. FCC* (*Sable*), 109 S.Ct. 2829 (1989), the Court upheld the ban on obscene telephone transmissions, but struck down the part of the statute that applied a total ban on indecent communications. The Court observed that "[t]he government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." 109 S.Ct. at 2836, 2839. Referring to the FCC regulations adopted under the previous statute, the Court noted:

> For all we know from this record, the FCC's technological approach to restricting dial-a-porn messages to adults who seek them would be extremely effective, and only a few of the most enterprising and disobedient young people will manage to secure access to such messages. If this is the case, it seems to us that § 223(b) is not a narrowly tailored effort to serve the compelling interest of preventing minors from being exposed to indecent telephone messages.

Id. at 2838-39 (footnote omitted).

7. In response to the *Sable* decision, Section 223 of the Act was amended in November 1989 to regulate (rather than prohibit) indecent telephonic communications for commercial purposes. The new Section 223 continues the outright ban on obscene communications for commercial purposes, but limits minors' access to indecent communications. The Section extends the criminal and civil penalties for both obscene and indecent telephonic communications to intrastate as well as interstate communications. As noted previously, Section 223(b) reestablishes an affirmative defense to prosecution for providers of indecent communications that comply with Commission regulations. Section 223(c) requires, with certain exceptions, that carriers block access to adult message services unless a subscriber requests the carrier in writing to provide access.

8. To carry out its role under Section 223, in the *NPRM* the Commission proposed to adopt, and sought comment on, regulations similar to those of the *Third Report and Order*. It specifically asked parties to focus on the effectiveness, feasibility and need for the billing notification requirement in proposed subsection (d) in light of intervening statutory, regulatory or market changes.[13] Parties were also asked to offer alternatives, including technological advances and new telephone company service offerings, with full discussion of the related costs and benefits of each alternative.[14] Additionally, parties were asked to comment on whether information providers should be required to notify their carrier of the nature of the communications they intend to offer, where the carrier offers them the commercial service described in Section 223(c)(1).[15]

9. In the following paragraphs, we summarize the responses of the commenters to the regulations proposed in the *NPRM*, address additional issues raised, and discuss our findings and conclusions. We adopt the rules essentially as they were proposed.

III. DISCUSSION

A. Constitutionality

10. Some parties contend that the statute and our regulations are unconstitutional. First, parties argue that the statute and proposed regulations are unconstitutionally vague because the terms "obscene" and "indecent" are not defined. Second, parties argue that the proposed regulations are more burdensome than is necessary to serve the government's interest.

11. With respect to the first question, we conclude that the First Amendment does not require that the terms "indecent" and "obscene" be defined in either the statute or the regulations. Many federal statutes prohibit obscene speech without defining the term, *see, e.g.*, 18 U.S.C. § 1462 (interstate transportation of obscene material); 18 U.S.C. § 1461 (mailing obscene material), because the Supreme Court has supplied a definition of "obscene" under federal law. *See United States v. 12 200 - foot Reels of Film*, 413 U.S. 123, 130 n.7 (1973). Indeed, in the *Sable* case, the Supreme Court upheld the portion of the statue that prohibited obscene speech. We therefore conclude that the term "obscene" in the statute is not unconstitutionally vague.

12. The Supreme Court has also accepted the regulation of "indecent" speech under certain conditions, even though that term is not defined in the statute. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding prohibition of indecent broadcasts under 18 U.S.C. § 1464 when there is a reasonable risk that children are in the audience). In the broadcasting context, the courts have upheld the Commission's definition of indecency as "the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the broadcast medium." *Pacifica Foundation*, Memorandum Opinion and Order, 2 FCC Rcd 2698, 2699, *recon.*, 3 FCC Rcd 930 (1987), *aff'd in relevant part and rev'd on other grounds, Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (*ACT v. FCC*); *FCC v. Pacifica Foundation*, 438 U.S. at 732. The Supreme Court has also determined that the term "indecent" is not unconstitutionally vague, *see FCC v. Pacifica*, 438 U.S. at 742-43. *See also ACT v. FCC*, 852 F.2d at 1338, n.9. Thus, in the dial-a-porn context, we believe it is appropriate to define indecency as the description or depiction of sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the telephone medium.

13. The fact that the meaning of "indecent" can be given greater specificity on a case-by-case basis does not make the term unconstitutionally vague any more than the term "obscene" is unconstitutionally vague. Service providers, when judging whether certain material is legally indecent, must exercise the same kind of judgment that they are obligated to exercise when judging whether certain material is legally obscene. They must apply a generic definition with reference to the guidance provided by existing case law on the matter.

14. Turning to the second question, we note that the government may regulate indecent speech in order to promote a compelling interest if the means are narrowly tailored to achieve those ends. *Sable* at 2836. While most commenters concluded that our proposed regulations were a narrowly tailored means of protecting minors from access to indecent material, Providers Coalition and Fleishman argue that dial-a-porn providers should also have a defense if they operate in areas served by telephone companies that permit customers to block access to adult messages.[16]

15. The statute requires telephone companies to provide reverse blocking where technically feasible, and it also requires message providers to comply with Commission regulations. Therefore, the Providers Coalition/Fleishman proposal raises two issues. The first issue is whether blocking alone is a less restrictive, effective means of protecting children than blocking plus message provider regulations. The second issue is whether voluntary blocking is a less restrictive, effective means of protecting children than reverse blocking.

16. We conclude that our regulations represent a narrowly tailored method of achieving a compelling government interest, namely, protecting children from indecent material.[17] The regulations are designed to make indecent communications available to adults who affirmatively request the service, but unavailable to minors. With respect to the first issue raised by the Providers Coalition/Fleishman proposal, blocking alone -- reverse or voluntary -- is insufficient to satisfy Congress' objective of protecting children. Without the additional restrictions on access put in place by dial-a-porn providers (scrambling, access codes, credit cards), children will still be able to gain access to indecent communications. Blocking, as a technical matter, will not prevent children from accessing dial-a-porn messages in another area code. Blocking operates by the telephone company central office equipment recognizing only the first three numbers dialed, and completing the call (or not completing it) according to the instruction programmed for those three numbers.[18] Moreover, even if a child's home telephone is blocked, the child may still be able to receive indecent communications from a payphone, or a telephone in a home or other location where the blocking option has not been exercised.

17. The second issue raised by these commenters is whether voluntary blocking, as opposed to the reverse blocking required by the statute, is the least restrictive, effective alternative. The statute requires telephone companies to block access to providers of indecent services if technically feasible, unless the customer requests access.[19]

18. The First Amendment does not preclude Congress from imposing a burden on message providers. *See Sable v. FCC*. Regulations need not be so weak that they are completely useless. It was reasonable for Congress to conclude that its reverse blocking scheme would be considerably more effective than a voluntary scheme in preventing children from accessing indecent material. A voluntary blocking scheme would be far less effective in protecting children from exposure to indecent material because it is likely that most parents would not realize the need for blocking until their children had already obtained access to indecent messages. Nor would neighbors or relatives where children are only occasional visitors recognize the need to, nor act to, have access blocked. It is reasonable, therefore, to implement a reverse blocking scheme that brings the potential problem to the attention of parents *before* the damage to children has occurred, rather than waiting until the damage has been done. *See generally FCC v. Pacifica*, 438 U.S. at 748-49.

19. Fleishman states that voluntary blocking is in effect in California. However, the California legislature was apparently not satisfied with the efficacy of that regulatory approach, for it has enacted a more complete scheme, which includes the same sort of reverse blocking required by Section 223(c). 47 U.S.C. § 223(c). *See* Pacific Comments, Attachment 1.

20. In California under a voluntary blocking approach, the number of people asking for blocking was quite small. If only 10 percent of phones are blocked, children will have ready access to indecent materials via phones in neighbors' and relatives' homes and in public places. A reverse blocking scheme is far more effective in preventing children from gaining access to indecent messages. In addition, a reverse blocking approach puts the burden on those who want access to messages, rather than on those who wish to protect their children. The burden is not great in either case -- it requires merely writing to the telephone company to request access or blocking.[20] Balancing all the interests, it is apparent that reverse blocking is an effective, not unduly restrictive, means of protecting children.

21. Even assuming, as Ameritech argues,[21] that complaints may be reduced in some areas where voluntary blocking has been used, voluntary blocking by itself does not substantially eliminate calls to indecent message providers by children.[22] We therefore believe that reverse blocking is the least restrictive means of achieving Congress's compelling interest in substantially eliminating (not simply reducing) children's access.

22. To the extent that message providers are arguing that the Congress' reverse blocking requirement will drive them out of business, and is therefore unconstitutional, we disagree. Reverse blocking, together with the Commission's regulations, constitute a regulatory approach that is narrowly tailored to address a compelling need. This approach may cause message providers to incur additional costs, and perhaps to raise their prices, but the Supreme Court has said that raising the cost of providing a service is not unconstitutional. *Sable v. FCC*, 109 S. Ct at 2836. In addition, the statute requires reverse blocking only if the telephone company performs certain billing and collection services for the message provider. The record does not show message providers cannot feasibly arrange for independent billing for their services. We see no reason why adult message providers cannot continue to operate under the statutory scheme.

B. Defenses to Prosecution

23. In the *NPRM* the Commission proposed to readopt the regulations of the *Third Report and Order* and require that, in order to have a defense against prosecution under Section 223 for providing indecent material, a provider must utilize credit cards, access codes, or scrambling, and, where applicable, carrier billing notification. The Commission sought comment on this proposal, including the effectiveness, feasibility and need for the billing notification requirement in proposed subsection (d) in light of intervening statutory, regulatory or market changes. Commenters were asked to provide cost analysis, and to explain how any alternative proposals offered would achieve the intent of Congress and the Court.

24. *Credit Cards, Access Codes, and Scrambling (Sections 64. 201 (1) (b), (c), and (d).* The Commission proposed as one defense to prosecution that payment by credit card be required before transmission of the message. Few commenters addressed this proposed defense. The Providers Coalition states that it is necessary as a safe harbor, but it "is by no means sufficient to protect all of the substantial First Amendment interests at stake in this proceeding."[23] The Providers Coalition argues, for example, that credit card use requires sacrifice of anonymity, and that banks do not wish to act as clearing agents for information providers because of the problem presented by fraudulent transactions and transactions disavowed by cardholders. The Providers Coalition further states that not all members of the public have credit cards and that people may be reluctant to disclose their card number by telephone for fear of misuse. It notes that many teenagers work in commercial establishments where they have access to credit card and issuing bank information and a "semi-adventurous and clever teenager can access information programs that use credit card billing and collection."[24]

25. With respect to the proposed defense of scrambling, several commenters argue that current technology does not support the use of descramblers in practice. Pacific states that it does not support scrambling as the most effective, least restrictive method of restricting minors' access. Pacific states that scrambling appears to be easily circumvented.[25] Pacific does not, however, object to scrambling as one of several options available to prevent access.[26] The Providers Coalition states that it does not believe any descrambler is commercially available today.[27] One commenter, John J. Olivo, who indicates he holds a patent for his alternative proposal termed "beep-tone" technology, states that message descramblers are not feasible because they have never been manufactured and made available at the consumer level, and most likely would not lend themselves to the rigors that the average consumer would subject them to.[28] Olivo states that tuned filters in descramblers are especially sensitive to environmental conditions, and can drift over time, requiring recalibration.[29] He further states that the temperature sensitive amplifiers and oscillators in descramblers are also capable of becoming uncalibrated.[30] Olivo argues that higher cost systems would be effective, but they would be impractical for the purposes relevant in this proceeding, costing approximately fifty dollars per unit and with a limited useful life.[31] Olivo also notes that, since descramblers are portable, children may be able to get them for their own use.[32]

26. A third proposed defense to prosecution is that the defendant require an authorized access or identification code before transmission of the message. The information provider must issue the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age. The Providers Coalition states that there are few callers willing to undergo the effort required for issuance of such an access code.[33] The Providers Coalition cites the result of presubscription in the Bell Atlantic region where, it states, all adult and live information providers were put out of business.[34] It notes that callers with a rotary telephone are excluded from use of an access code.[35] It states that the information provider will have the additional expense of marketing and validating the codes and that teenagers by means of "hacking" will be successful at breaking the access codes. The Providers Coalition does not, however, propose the elimination of access codes as a defense, but rather states that its own proposed safe harbor will prove at least as effective.[36]

27. We find that any analysis of the proposed defenses must take into account that the defenses are meant to offer a variety of choices to information providers to avoid liability under the statute. We note that both the Supreme Court and the Second Circuit have recognized the effectiveness and/or feasibility of these approaches.[37] No single defense is intended as the sole means by which all information providers must operate in order to avoid prosecution. The defenses proposed take into account the varying technologies used by information providers and the differing business practices within the information industry. We find that the use of credit card validation, scrambling or access codes before transmission places a minimal burden on the information provider and consenting adult while helping to assure that access by minors is restricted. Nevertheless, we believe Congress could reasonably conclude that each of these is far from foolproof and can be counteracted by less than the "most enterprising and disobedient young [person]," *see Sable*, 109 S. Ct. at 2838. Accordingly, it is necessary to impose reverse blocking, where technically feasible, to achieve Congress's compelling interest in protecting children. We find that the proposed defenses are sufficiently varied that any information provider should be able to adapt at least one of the proposed defenses to its operation without unreasonable expense.

28. The fact that many Americans already hold credit cards and the vast majority of such cardholders are over eighteen years of age supports the use of credit card payment as a means to restrict access by minors. Credit cards are frequently used by consumers to make purchases by telephone. Credit card validation, where available, places a minimal burden on consenting adults, and information providers that choose that option, while providing a high level of confidence that access by minors is restricted.

29. Comments opposing descramblers generally do not show that technological faults are any less applicable to any other coding or sensing scheme using electronic components. Indeed, network switching equipment, as well as telephones, contain technology and components subject to environmentally triggered instabilities. Engineers generally handle these phenomena with temperature compensating components that cost pennies to install. We need not limit the technological schemes which may be used to assure the effectiveness of our scrambling proposal. Other methods or techniques that achieve a result as effective as the proposed frequency inversion technique would be acceptable. Therefore, we have dropped the exclusive reference to "frequency inversion techniques" and instead adopt less restrictive language in the proposed scrambling defense. The rule does not endorse any particular scrambling technique but affords information providers with a scrambling defense generally.[38] We find that for some information providers this method may prove to be the most cost effective and easiest to implement. The fact that a few more mischievous minors may attempt to circumvent scrambling does not negate the overall potential efficacy of this method.[39] We therefore find that the scrambling defense is a minimally restrictive but efficient method of implementing the intent of the statute.

30. Regarding authorized access or identification codes, no commenter has suggested that the access code defense should be eliminated. The Providers Coalition's criticisms of the defense merely underscore what the Commission has already recognized and incorporated in the proposed regulatory scheme, *viz.*, that no single defense to prosecution can serve the needs of all information providers and carriers. The efficacy of each defense will depend on the circumstances under which it is used, taking into account the technology utilized and the information service provided. In circumstances where the provider has an established pool of repeat customers the access code defense may prove particularly effective and minimally restrictive.[40] In addition, access code systems have been utilized in the financial services sector as an effective means to restrict access to account holders only. The likelihood that access codes will become available to most minors is small; yet in the hands of an adult the code is a reasonably easy method of access and may even be useful to information providers as a method to encourage their repeat business. As one of several options, it may represent, for some, the least restrictive method to bar access to minors.

31. Regarding the written subscription element of the access code defense, we find that, as noted by AFA, many commercial information services, such as magazines and other publications, require a written subscription prior to receipt of materials; subscription is often the basic framework of their business operations.[41] Most importantly, we find that a written request is a minimally burdensome mechanism by which providers may monitor that a subscriber is over eighteen.[42] We believe that mere telephonic confirmation is an insufficient basis upon which to reasonably ascertain that the information recipient is, in fact, over eighteen. Written subscriptions, which serve essentially as a tangible record of the caller's representations, are not likely to encourage misrepresentations by minors. In addition, with such applications in their business records, providers will have proof, to the extent such proof may hold probative evidentiary value, that a subscriber represented he or she was of majority age before the subscriber was issued an access or identification code.[43]

32. *Billing Notification as an Adult Telephone Message Service for Sponsors Subscribing to Mass Announcement Service Tariffed by the Commission* (Section 64.201(1)(e)). The proposed regulations state that in order to avail itself of one of the above enumerated defenses, *viz.*, use of credit cards, access codes or scrambling, an information provider who is a message sponsor subscribing to a mass announcement service tariffed at this Commission must, prior to transmission, request in writing to the carrier providing the announcement service that calls to this message service be subject to billing notification as an adult telephone message service. Contel objects to the Commission's proposal that calls on subscribers' bills be labeled as adult messages,[44] arguing there is no justification for specifying the content of one category of information services, and not others.[45] Contel notes that it is costly to modify billing systems to include these annotations.[46] Contel argues that such branding fails to further the articulated interest of restricting access by minors and that no benefit is derived from the associated cost.[47] Pacific echoes these arguments and states, without quantifying, that billing notification would require significant changes to billing systems and increase billing costs. Similar arguments are presented by the Providers Coalition. AFA and the Connecticut Attorney General, however, note that billing notification facilitates the implementation of the regulatory scheme devised by the Commission.[48] They urge that billing notification permits parents to more carefully monitor the activities of their children, and permits them to become aware, usually for the first time, that someone, potentially a child, has been accessing adult messages.[49] AFA analogizes billing notification to a warning of any kind which permits adults the opportunity to avoid the harm in the future.

33. Despite objections raised by some commentors, we are adopting the billing notification requirement as proposed. First, billing notification was a part of the Commission's rules promulgated in the *Third Report and Order*, para. 5, *supra*, and only applies to mass announcement services tariffed at this Commission. The parties opposed to its use have not demonstrated why its reimposition would cause new or different problems or costs.[50] Second, it could provide an important means for parents and others to monitor unauthorized use by minors if other safeguards are evaded. Billing notification provides an effective way for adults to detect unauthorized use. We agree with AFA that billing notification remains an important enforcement tool. Without it, subscribers may be unaware that a violation of the statute has taken place via their telephone.

34. *Information Providers' Notice to Carriers of Provision of Indecent Material* (Section 64.201(1)(a)). In the *NPRM* the Commission stated that one additional requirement may be useful in implementing the blocking procedure mandated by Section 223(c)(1) of the Act. The Commission noted that Section 223(b)(3) of the Act appears to require that adult message service providers notify their carrier of the nature of the communications they intend to offer. The proposed regulations state that:

> [i]t is a defense to prosecution under Section 223(b) of the Communications Act of 1934, as amended, 47 U.S.C. §223(b), that the defendant has notified the common carrier identified in Section 223(c)(1) of the Act, in writing, that it is providing the kind of service described in Section 223(b) of the Act . . . .

AC&E opposes this requirement, stating that the proposed regulations are unclear as to *who* must give notice.[51] AC&E further argues that notice is only meaningful when no other safeguard is in place to ensure that the subscriber is eighteen or older.[52] AC&E states that credit card validation already serves this purpose, so that notice to the carrier does nothing to further the goal of the legislation or the Commission.[53] In instances where there is no carrier billing and either paragraph 1(a), 1(b) or 1(c) of the proposed regulations is complied with, AC&E argues that the notice requirement should be removed.[54] AC&E also states that the notice requirement forces an entity to incriminate itself and make qualitative assessments of the content of the communication, which should instead be made by a judge or a jury in a proceeding designed to establish a violation. The Providers Coalition recounts that New York Telephone (NYT) asked the New York Public Service Commission (NYPSC) to be allowed to discontinue provision of billing and collection for all programs that NYT deemed adult or adverse to its corporate image. The Providers Coalition states that NYT had proposed that all programs on the 970 exchange be

blocked except to those who presubscribed prior to transmission.[55] According to Providers Coalition, the NYPSC advised NYT that it did not believe the company should monitor information providers' programs; NYT was ordered to search for another regulatory mechanism which complied with amended Section 223 of the Act in the least intrusive manner.[56]

35. On the other hand, carriers such as GTE argue that absent a notice requirement, the information provider will have little or no incentive to inform the carrier of the provision of indecent communications and a strong incentive to avoid giving such notice.[57] GTE also argues that in assuring compliance with subsection 223(c), *i.e.*, assuring that to the extent technically feasible access to dial-a-porn is limited to subscribers who have previously requested such access, it is vital that the carrier know the status of a particular information provider.[58] Pacific states that under California law and Pacific Bell's tariffs all information providers must designate their programs to be "recorded general audience," "live general audience" or "harmful matter".[59] Pacific reports that to date no information provider has identified itself under "harmful matter".[60] Pacific argues that information providers may have a greater incentive to do so under the federal statute and the Commission's regulations because notification is a requirement for the affirmative defense provided by Section 223(b)(3) of the Act. AFA states that without notice carriers have no way of implementing blocking.[61] It notes that the notification requirement will insure that the free market bargaining system is working and any contracts entered into by the carrier and provider are based upon accurate information.[62] Similarly, BellSouth opposes AC&E's suggestion that information providers not be required to notify carriers of the adult nature of programming.[63] BellSouth believes the notice requirement places the burden where it belongs -- on the information provider -- rather than on the customer.[64]

36. In order to effectuate Congress's mandate that reverse blocking be implemented, it is necessary that either the carrier or the message provider determine whether the messages involved are indecent. There is nothing in the record to show that requiring adult information providers to inform the carrier offering them the commercial service described in Section 223(c)(1) of the nature of the communications they intend to offer imposes other than a minimal burden, or that it is not an essential adjunct to implementation of blocking by carriers. Placing the burden on the information provider to give notice of the provision of indecent communications resolves the issue raised by the Providers Coalition because carriers need not monitor communications where providers are required to declare the nature of the subject communication to establish a defense to prosecution. We disagree with AC&E's assertion that notification to the carriers results in self-incrimination. The fact that an indecent communication has been made by telephone for commercial purposes is insufficient to establish a violation of Section 223 of the Act; rather, liability results when these communications are made available to minors or nonconsenting adults. Moreover, we do not believe that this issue will arise in the normal course. As a practical matter, a service provider generally will identify itself to the carrier as providing adult information only in those instances where the service provider has complied as well with the additional defenses set forth in our regulations. Having availed itself of the safe harbor provided by our rules and the statute, there is little risk of prosecution under Section 223.

37. We also here clarify, in response to AC&E's comments, that Section 64.201(1)(a) requires notification by information providers to carriers that provide the commercial service described in Section 223(c)(1) of the Act: *i.e.*, where the carrier provides billing and collection services to the information service provider. Notification is required only in such instances, because the carrier is not otherwise required to block the information service.

C. Questions of Interpretation or Clarification

38. Several commenters have raised issues of interpretation regarding the statute or the proposed regulations. We shall consider such questions posed by commenters in turn.

39. *Presubscription and Carrier Blocking.* Several commenters are critical of the mandate in Section 223(c)(1) of the Act that a common carrier shall not, to the extent technically feasible, provide access to a communication specified in subsection (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.[65] The requirement that subscribers present a written request to the carrier is termed "presubscription" by the commenters. Several state attorneys general endorse presubscription not only for adult services but for all pay per call information services.[66] At least one carrier believes that Section 223 does not mandate any carrier activity. [67] Ameritech appears to interpret the carrier blocking in Section 223(c) of the Act as a voluntary regulatory mechanism. USTA, for its part, seems to acknowledge that Section 223(c) requires carrier blocking but believes the Commission should recognize by rule or order that a carrier covered by the Act has an obligation to block only when it has a billing and collection agreement or other arrangement with an information provider.[68] The Providers Coalition states that the Commission should clarify that Section 223 does not require two restrictions on access, *i.e.*, notice by the information provider to the carrier and written request by the subscriber for access.[69] NYG&L states that presubscription will curtail the availability of adult services and force customers to express their sexuality in far less safe and potentially life-threatening ways.[70] AFA replies that NYG&L fails to draw a nexus between diminution in the availability of the service and increased violence or disease.[71] AFA further states that commenters fail to identify how the requirement that all persons wishing to receive adult messages make the request in writing identifies those subscribers who are homosexual and thus holds them up to public ridicule and potential violence.

40. Initially, we observe that presubscription to the carrier is mandated by Section 223(c) of the statute and was not a regulatory mechanism initiated in the *NPRM*. Section 223(c) states:

> A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication specified in sub-

> section (b) from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

47 U.S.C. §223(c). To the extent commenters have questioned the plain meaning of Section 223(c), we note that Section 223(c) is not framed as a voluntary defense but instead requires direct compliance by carriers. The only limitations to mandatory blocking by carriers under Section 223(c) are technical infeasibility and lack of a billing and collection arrangement between the carrier and information provider as described in the section.[72] Indeed, it is clear that Congress contemplated defenses to prosecution separate and apart from carrier blocking. Section 223(c) mandates blocking and Section 223(b)(3) states that it is a defense to prosecution if the defendant restricts access in accordance with carrier blocking *and* with such procedures as the Commission may prescribe by regulation. Nevertheless, in order to clarify that carrier blocking is a matter separate and apart from the enumerated defenses to prosecution, we are incorporating the carrier blocking mandated by Section 223(c) of the statute as a new subsection in the final regulations at 47 C.F.R. §64.201(2).

41. USTA argues that the Commission should make clear that carriers that are not obligated to block under the Act may nevertheless restrict access to prohibited communications by minors through other means.[73] USTA argues that carriers that have no lawful obligation to block, *e.g.*, because of technical infeasibility, but who make attempts to comply with the intent of the statute, could be outside the statutory defenses to prosecution.[74] USTA has failed to define or articulate what alternative "attempts to comply" it wishes the Commission to consider as additional defenses to prosecution. The Commission is not able to issue advisory opinions regarding abstract or vague protections against liability. Specific rule proposals consistent with the intent of Section 223, however, would be considered.

D. Technical Issues

42. Several commenters have indicated that even assuming carriers receive proper notification from information providers of the provision of indecent communications, it is not technically feasible to provide universal blocking of indecent programs and then to permit subscribers to selectively unblock on either a program-by-program or class of programs basis.[75] Commenters generally agree that universal blocking with selective unblocking will require at minimum the designation of a three digit prefix within the local exchange. This allows for automatic blocking of all adult programs and selective unblocking of that prefix at the request of the subscriber. While we recognize that current technology does not permit subscribers to unblock specific adult programs while continuing to block other adult programs on the same prefix, program by program selectivity is not necessary in order to protect minors from access to indecent communications. Once a subscriber has exercised the choice to unblock adult programming, generally, it seems irrelevant whether that subscriber is capable of receiving one or several such programs. This and other issues raised by commenters regarding the feasibility of blocking as required by Section 223(c)(1) focus on the meaning of "to the extent technically feasible" in that section. The extent to which a carrier may claim blocking is technically infeasible, by reason of equipment anomaly, cost or regional protocol incompatibility, represents a factual question that can be resolved only on a case by case basis in the context of a particular proceeding. It is not necessary, therefore, that we respond further to these issues.

E. Alternative Proposals

43. In the *NPRM* commenters were asked to offer alternative regulatory mechanisms to achieve the intent of the statute, including alternatives based on technological advances and new telephone company service offerings, with full discussion of the related costs and benefits of each alternative, in conjunction with and independent of the options proposed in the *NPRM*. [76] Alternative proposals were presented by Fleishman, Providers Coalition, RAAP, Olivo and GTE. We will analyze each of these proposals.

44. Fleishman and Providers Coalition propose an additional defense to prosecution where the information provider uses a telephone information service network that offers callers the option of obtaining, without charge, blocking of access to adult messages, *i.e.*, voluntary blocking.[77] As discussed above (paragraphs 17-21), we do not agree that a "less restrictive" way of prohibiting access by minors is to place the burden on every subscriber in the country to monitor the use of his/her telephone and affirmatively request blocking where needed to protect minors. The availability of blocking at the request of the subscriber does not serve to ensure that minors are protected from access to indecent communications to the same extent as under our rules.

45. Commenter Olivo seeks approval of a device, which uses a beep tone recognition and reaction mechanism to trigger disconnection, as an alternative to the descrambling defense. Though we are amenable to additional, effective defenses based on sound technology, the record offers neither independent analysis or support for his device, nor a showing that its interaction with the central office is practical, effective or compliant with Part 68 of the rules.[78] Absent a demonstration that Olivo's device can be reliably utilized in the network, we believe it is premature to establish an independent defense based upon it. Although we believe it is premature to adopt the alternative technology urged by Mr. Olivo, we will consider approving this or similar technologies as an additional defense if Mr. Olivo (or others) can show that the device is registerable under Part 68, as well as effective. We encourage interested persons to bring new technologies to our attention through the filing of petitions for Rule Making.

46. RAAP advocates strict enforcement of the regulations through creation of an advisory committee comprised of concerned citizens and community leaders to review on a monthly basis reported violations and, when appropriate, to assist in monitoring and enforcement.[79] RAAP also suggests that the Commission should issue a six month interim report and thereafter yearly reports on the progress and success of Commission monitoring and enforcement actions, as well as on the effectiveness of the new regulatory scheme. We observe that the statute provides for enforcement of Section 223(b) by the Commission or by the Attorney General of the United States.[80] At this initial stage of implementation of the statute and the

regulations, and until circumstances demonstrate otherwise, it is sufficient that the Commission or the Attorney General serve as the forum for resolving or investigating alleged violations of the Act. We take our enforcement obligations seriously and intend to enforce the Act strictly.[81]

47. GTE urges that carriers should be authorized to require as a condition of access by information providers notice as to whether the provider will furnish obscene or indecent communications.[82] GTE states that by claiming not to be a provider of indecent communications a provider could justify giving no notice to the carrier.[83] GTE suggests that a notice requirement could be incorporated into company procedures or tariffs.[84] As discussed *supra*, notice to the carrier of the provision of indecent communications is an essential element in implementing carrier blocking. The statute requires no more and we are not persuaded by GTE that any alternative or supplementary notice is needed.

F. Miscellaneous Issues

48. AC&E states that the regulations outline the criteria of defenses to criminal prosecution under Section 223(b) but fail explicitly to state that such defenses are available as a defense to a civil fine.[85] The proposed regulations state in relevant part that: "[I]t is a defense to prosecution under Section 223(b) of the Communications Act . . . ."[86] Thus, our regulatory defenses to prosecution for the provision of indecent communications under Section 223(b) generally are applicable to all subsections of Section 223 whether in the context of civil or criminal proceedings.

49. AC&E also notes that payment by credit card before transmission requires about 30 days and that the credit card defense should be amended to reflect this fact. The plain meaning of the term "payment" as it is understood in a cash economy refers to tender of payment by the cardholder at the time of the transaction between the credit card holder and the merchant. The proposed regulation does not require receipt of funds by the merchant prior to message transmission, but requires only completion of the sale to the customer which results in a billing to the customer's credit card.

50. AC&E further states that paragraph 1(d) of the proposed regulations, 47 C.F.R. § 64.201(1)(e), is inapplicable when the carrier is not billing. AC&E suggests it should be amended to include a definition of the term "mass announcement service" and that subsection (d) be further amended to specify that it is only applicable to entities utilizing carrier-provided billing.[87] We believe the rule language is sufficiently clear, applying to any mass announcement service tariffed at this Commission for which the carrier provides billing and collection services on behalf of the service provider.

51. Several commenters argue that restrictions on indecent communications will have an adverse impact on the fight against AIDS by restricting open discussion of related issues by telephone.[88] The proposed regulatory scheme does not restrict communications which are clinical discussions of AIDS or any other topic. Legitimate scientific or social endeavors such as community hotlines generally fall outside the definition of obscenity or indecency. *See Pacifica Foundation Reconsideration*, 3 FCC Rcd. at 932. In addition, we note that the statute encompasses only those indecent or obscene communications which are produced for commercial purposes.

IV. CONCLUSION

52. Consistent with the Supreme Court's analysis in *Sable*, the final regulations adopted by this order will protect minors from access to indecent communications in the most minimally burdensome manner to information providers, carriers and those adults who desire to receive access. We believe that the blocking mandated by the statute and now incorporated into the regulations is an essential mechanism in accomplishing the compelling government interest to protect minors from these adult information services. The defenses to prosecution in the final regulations allow information providers the freedom to operate within the law and enable adults to access the communications of their choice.

53. *Regulatory Flexibility Act Analysis*. As required by Section 603 of the Regulatory Flexibility Act, an analysis of the expected impact on small entities is set forth in Appendix C.

V. ORDERING CLAUSES

54. Accordingly, pursuant to Sections 1, 4(i), 201-205, 220, 223, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 201-205, 220, 223, and 303(r), Part 64 of the Commission's rules IS AMENDED as set forth in the attached Appendix B, effective 30 days after publication in the Federal Register.

55. The Office of Management and Budget has approved the collection of information requirements contained in this rule under OMB control number 3060-0439.

56. The Secretary shall cause a summary of this order to be printed in the Federal Register and shall send a copy to the Counsel for Advocacy of the Small Business Administration in accordance with Section 604 of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et. seq.* (1980).

57. It is ordered that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Comments were filed by:

Agudath Israel of America (Agudath),

American Communications & Engineering, Inc. (AC&E),

American Family Association (AFA),

Contel Corporation (Contel),

Stanley Fleishman, Esq. representing, "persons offering recorded messages dealing with sex and erotic fantasies, and persons who desire to hear those messages" (Fleishman),

Gay Men's Health Crisis (GMHC),

GTE Service Corporation and its affiliated domestic telephone companies (GTE),

The Information Providers Coalition for Defense of the First Amendment (Providers Coalition),

The National Coalition Against Pornography, Inc. and Religious Alliance Against Pornography, Inc. (RAAP),

The New York City Gay and Lesbian Anti-Violence Project (NYG&L),

Pacific Telesis on behalf of Pacific Bell and Nevada Bell (Pacific), and

United States Telephone Association (USTA).

Reply Comments were filed by:

AFA,

Ameritech Operating Companies (Ameritech),

Attorney General of the State of Connecticut,

Attorney General of the State of Georgia,

Attorney General of the State of Illinois,

Attorney General of the State of Michigan,

Attorney General of the State of North Carolina,

Attorney General of the State of Texas on behalf of Texas and the Attorneys General of Idaho and Minnesota,

BellSouth Corporation (BellSouth),

John J. Olivo, Esq.,

Providers Coalition,

Pacific,

Southwestern Bell Company (Southwestern), and

Supplemental Comments were filed by the Providers Coalition.

APPENDIX B

64.201 Restrictions on Indecent Telephone Message Services.

(1) It is a defense to prosecution for the provision of indecent communications under Section 223(b)(2) of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 223(b)(2), that the defendant has taken the action set forth in (a) below and, in addition, has complied with the following: Taken one of the actions set forth in subsections (b), (c), or (d) herein to restrict access to prohibited communications to persons eighteen years of age or older, and has additionally complied with subsection (e), where applicable:

(a) Has notified the common carrier identified in Section 223(c)(1) of the Act, in writing, that he or she is providing the kind of service described in Section 223(b)(2) of the Act.

(b) Requires payment by credit card before transmission of the message; or

(c) Requires an authorized access or identification code before transmission of the message, and where the defendant has:

(1) Issued the code by mailing it to the applicant after reasonably ascertaining through receipt of a written application that the applicant is not under eighteen years of age; and

(2) established a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired; or

(d) Scrambles the message using any technique that renders the audio unintelligible and incomprehensible to the calling party unless that party uses a descrambler; and,

(e) Where the defendant is a message sponsor subscriber to mass announcement services tariffed at this Commission and such defendant prior to the transmission of the message has requested in writing to the carrier providing the public announcement service that calls to this message service be subject to billing notification as an adult telephone message service.

(2) A common carrier within the District of Columbia or within any State, or in interstate or foreign commerce, shall not, to the extent technically feasible, provide access to a communication described in Section 223(b) of the Act from the telephone of any subscriber who has not previously requested in writing the carrier to provide access to such communication if the carrier collects from subscribers an identifiable charge for such communication that the carrier remits, in whole or in part, to the provider of such communication.

APPENDIX C

Final Regulatory Flexibility Act Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis with regard to the Report and Order is as follows:

I. Need and purpose of this action:

The regulations adopted by this Report and Order were required by Section 223(b)(3) of the Communications Act of 1934 (Act), as amended, 47 U.S.C. § 223(b)(3). The Commission adopts rules that will curtail children's access to indecent telephone messages and establish defenses to prosecution under Section 223(b) of the Act, as directed by Congress.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No additional comments were filed in direct response to the initial Regulatory Flexibility Analysis.

III. Significant alternatives considered and rejected:

The Commission considered the alternatives raised by the parties in this proceeding and considered all the comments directed to those issues. After carefully weighing all aspects of this proceeding, the Commission has adopted

the most reasonable course of action under the mandate of Section 223(b)(3) of the Communications Act, as amended.

FOOTNOTES

[1] *See* Pub. L. 101-166, 103 Stat. 1159, 1192-1194 (1989). The legislation was enacted on November 21, 1989.

[2] *See* Section 223(b), 47 U.S.C. § 223(b).

[3] The statute imposes this obligation to block only if "the carrier collects from subscribers an identifiable charge for [the] communication that the carrier remits, in whole or in part, to the provider of such communication." Section 223(c)(1), 47 U.S.C. § 223(c)(1).

[4] A list of commenters is provided in Appendix A. AFA filed its comments three days late, on March 5, 1990. In the interest of assembling a full and complete record in the proceeding, the Commission accepts AFA's comments and incorporates them into the record. Mr. Olivo filed *pro se* reply comments two weeks late, on March 27, 1990. Mr. Olivo proposes alternative technologies and technical analysis. Late-filed reply comments were also received from the Attorneys General of the states of: Connecticut, Georgia, Idaho, Illinois, Michigan, Minnesota, North Carolina, and Texas. In the interest of a full and complete record, Mr. Olivo's and the Attorneys' General reply comments are accepted and made a part of the record. The Providers Coalition filed a Motion for Leave to File Supplemental Comments. The Supplemental Comments address technological questions raised by some of the Bell Operating Companies (BOCs) in reply comments. In light of the issues raised by these reply comments and the fundamental interest in question, the Providers Coalition's Supplemental Comments are accepted and made a part of the record herein. Finally, we received approximately 200 informal comments or joint comments from about 800 private citizens; these commenters generally favored a total ban on obscene or indecent information services.

[5] The final rules adopted herein are set forth in Appendix B.

[6] *See* 47 C.F.R. § 64.201(1)(b), (c), and (d).

[7] 47 C.F.R. § 64.201(1)(a).

[8] *See* 47 U.S.C. § 223(c). *See also* 47 C.F.R. § 64.201(2).

[9] The Commission required that access codes be assigned by the message provider through a written application procedure under which the age of the applicant could be reasonably ascertained.

[10] *See NPRM* at paragraph 4.

[11] *See also NPRM* at paragraph 6.

[12] Pub. L. 100-297, 102 Stat. 424, April 28, 1988.

[13] *NPRM* at paragraph 11.

[14] *Id.*

[15] *Id.* at paragraph 12. *See also supra* note 3.

[16] We use the term "blocking" to include both "voluntary blocking" and "reverse blocking." By "voluntary blocking" we mean the telephone company will, at the central office, prevent calls from going through to specified exchanges or numbers if the customer has requested this blocking service. By "reverse blocking," we mean the telephone company will, at the central office, prevent calls from going through to specified exchanges or numbers *unless* the customer has requested access. Subsection (c) of the statute requires telephone companies to institute reverse blocking where technically feasible if they provide billing and collection services to indecent message providers.

[17] The Supreme Court has recognized that the government has a compelling interest in protecting children from exposure to indecent dial-a-porn. *Sable* at 2839. *See also Carlin I* at 121. The regulations we adopt are narrowly tailored to achieve our objectives, and do not impose unnecessary burdens. The addition of a defense for blocking would undoubtedly be less burdensome for dial-a-porn providers, but, as discussed in the text, it would be insufficient to achieve realistically the goal of the statute: the protection of children.

[18] The record is replete with evidence regarding this and similar technical problems with blocking. *See* note 75, *infra*.

[19] 47 U.S.C. §223(c).

[20] In some areas, where blocking has been instituted, the telephone company provides a form letter for customers to request access.

[21] *See* Ameritech Reply Comments at 2.

[22] *See* para. 16.

[23] Providers Coalition Comments at 6.

[24] *Id.* at 17.

[25] Pacific Comments at 8.

[26] *Id.*

[27] Providers Coalition Comments at 20.

[28] Olivo Reply Comments at 5.

[29] *Id.*

[30] *Id.* at 6.

[31] *Id.*

[32] *Id.*

[33] Providers Coalition Comments at 19.

[34] *Id.* at 14.

[35] *Id.*

[36] Providers Coalition proposes an additional defense to prosecution where the information provider uses a telephone information service network that offers callers the option of obtaining, without charge, blocking of access to adult messages. *See* discussion *infra* at paragraph 44.

[37] *Sable*, 109 S. Ct. at 2838-39; *Carlin III*, 837 F. 2d at 556.

[38] We also have made minor word changes for purposes of clarity.

[39] *See Sable*, 109 S. Ct. 2829 at 2838.

[40] The Attorney General of the State of North Carolina suggests that the information provider should be required to revise and reissue access codes periodically in intervals of approximately 30 days in order to improve the efficacy of access codes as a blocking mechanism. However, the access codes defense requires the information provider to establish a procedure to cancel immediately the code of any person upon written, telephonic or other notice to the defendant's business office that such code has been lost, stolen, or used by a person or persons under the age of eighteen, or that such code is no longer desired. We believe that at this stage of the implementation process, such cancellation procedures sufficiently safeguard the integrity of an access code blocking system.

[41] *See* AFA Reply Comments at 16-18.

[42] The Connecticut Attorney General states that message providers should be required to review a driver's license, passport, student identification card, voter registration card, or other documentary proof of majority prior to issuance of the access code, and that the regulation should include a list of acceptable documents. We find that the access code defense as adopted herein allows the information provider the freedom to verify majority age in writing in any reasonable and effective manner. At this stage it is not necessary to designate a list of documents

which the message provider must examine to determine that the subscriber is over eighteen. However, we may revisit this issue if instances of fraud or abuse indicate that renewed analysis is necessary.

[43] We note that Section 223 applies to both live and recorded adult message services. Our rules make no distinction in this regard. We also note that to the extent live conversation (as well as recorded message) services contain only isolated or fleeting language that is allegedly offensive, it would not likely rise to the level of actionable indecency. *See Pacifica Foundation Reconsideration*, 3 FCC Rcd. at 932.

[44] Contel Comments at 3.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] AFA Reply Comments at 8; Connecticut Attorney General Reply Comments at 8.

[49] AFA *Id.* at 9; Connecticut Attorney General *Id.*

[50] *See* Pacific Comments at 7; Contel Comments at 3.

[51] AC&E Comments at 3.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 13.

[57] GTE Comments at 3.

[58] *Id.*

[59] Pacific Comments at 3.

[60] *Id.*

[61] AFA Comments at 15.

[62] *Id.* at 7.

[63] BellSouth Reply Comments at 3.

[64] *Id.*

[65] 47 U.S.C. §223(c)(1).

[66] The National Association of Attorneys General passed a resolution on December 13, 1989 urging the FCC to: "[r]emedy the unrestricted availability and access to 900 and 700 numbers to protect parents and other telephone subscribers who do not consent to such calls." The association suggests that the preferred and most effective action includes mandatory presubscription. Comments endorsing this position were filed in this proceeding by the Attorneys General of the states of: Texas on behalf of Texas, Idaho and Minnesota; Georgia and Michigan.

[67] *See* Ameritech Reply Comments at 3.

[68] *See* USTA Comments at 2.

[69] Providers Coalition Reply Comment at 4.

[70] Comments of the New York City Gay and Lesbian Anti-Violence Project at 3.

[71] AFA Reply Comments at 15.

[72] Commenters' constitutional arguments on this issue are addressed *supra* at paragraphs 14-22.

[73] USTA Comments at 2.

[74] *Id.*

[75] *See e.g.*, Pacific Comments at 5-6, Ameritech Reply Comments at 3, Providers Coalition Reply Comment at 10, BellSouth Reply Comments at 2, and Southwestern Bell Comments at 2.

[76] *NPRM* at paragraph 13.

[77] *See* Fleishman Comments at 2. Providers Coalition Comments at 5.

[78] *See* 47 C.F.R. Part 68, notably Sections 68.308 and 68.314. However, scramblers and descramblers are registered under Part 68 of the Commission's rules.

[79] RAAP Comments at 36.

[80] 47 U.S.C. §§ 223(b)(5) and (6).

[81] Similarly, we do not believe at this time that it is necessary formally to institute a reporting procedure for our enforcement efforts.

[82] GTE Comments at 4.

[83] *Id.*

[84] *Id.*

[85] AC&E Comments at 6.

[86] *See* proposed 47 C.F.R. § 64.201(1).

[87] AC&E Comments at 8 referring to proposed regulation §64.201(d), now §64.201(1)(e) of the final rules.

[88] *See* GMHC Comments at 2, NYG&L Comments at 5, Providers Coalition Reply Comments at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ORION
SATELLITE
CORPORATION

Request for Final Authority File No. CSS-83-002-P-(M)
to Construct, Launch and Operate
an International Communications
Satellite System.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: June 22, 1990; Released: August 6, 1990

By the Commission: Commissioner Barrett issuing a statement; Commissioner Duggan concurring in the result.

1. We have before us filings by the Orion Satellite Corporation (Orion) seeking final authority to construct, launch and operate its proposed international satellite system which the Commission conditionally authorized in 1985.[1] Orion filed on February 3 and September 5, 1989, modifications to the technical parameters of its proposed system.[2] Pan American Satellite (PAS) commented on each of Orion's technical filings.

2. On August 30, 1989, the Department of State notified the Commission that the United States has fulfilled its obligation under Article XIV(d) of the INTELSAT Agreement with respect to the Orion system. [3] Pursuant to procedures established in the *Separate Systems* decision,[4] Orion timely filed information on October 31, 1989, to establish its financial qualifications to construct, launch and operate its proposed satellites.[5] On December 19, 1989, Orion supplemented its October 31 filing with additional documents.[6] Orion further supplemented its financial demonstration with a number of filings in May, 1990.[7] No party filed comments on, or oppositions to, Orion's financial qualifications.

I. BACKGROUND

A. Separate Systems Policy

3. In its 1985 *Separate Systems* decision, the Commission established policies and procedures for regulatory consideration of applications to construct, launch and operate satellite systems that would provide international satellite communications services separate from INTELSAT. Orion is one of several separate systems that have been authorized by the Commission[8] subject to the following conditions:

> (1) each system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service); and,
>
> (2) one or more foreign authorities are to authorize use of each system and enter into consultation procedures with the United States party under Article XIV(d) of the INTELSAT Agreement to insure technical compatibility and to avoid significant economic harm.[9]

B. The Orion Satellite System

4. Orion's proposed system will consist of two Ku-band satellites located at the 37.5^0 W.L. and 47^0 W.L. orbital locations. Orion plans to procure Eurostar 2000 design satellites developed jointly by British Aerospace Limited (BAe) and Matra Espace S.A. in partnership as Satcom International.[10] Orion will provide television transmissions and distribution, point-to-point and point-to-multipoint digital transmission, and cable restoration service. The projected launch dates of the satellites are the fourth quarter of 1992 and the second quarter of 1993. The satellites will have sufficient fuel for at least 12 years of service life. They each will have 34 transponders (48 36 MHz equivalent transponders) in eight fixed beams covering North America, Western Europe and portions of Africa. They will operate in the frequency bands 14.0-14.50 GHz in the uplink and 11.45-12.26 GHz in the downlink. Each transponder will be capable of carrying one or more video channels. The data capacity is dependent upon the transmit and receive earth stations and their modulations. The satellites will also have normal redundancy equipment and telemetry, tracking and control (TT&C) subsystems to monitor and control the spacecraft at all times. The on-ground satellite system will be staffed on a 24-hour basis, will have fully redundant equipment and will monitor contact with each satellite.

II. TECHNICAL AMENDMENTS

A. Pleadings

5. Orion's February 3, 1989, technical modification was filed in response to a request by the Chief, International Facilities Division to amend and update its application to accurately reflect the technical design of its proposed system.[11] The information filed by Orion consisted of the technical parameters that had been submitted to INTELSAT in connection with the then ongoing technical consultations being held between INTELSAT and the United States and the United Kingdom pursuant to Article XIV(d) of the INTELSAT Agreement.[12] Orion advised the Commission that further modifications may be made depending on the progress of the consultation with INTELSAT.

6. In its comments on Orion's February 3 modifications, PAS alleged that there exists a significant potential for excess interference between the operating PAS-1 satellite at 45^0 W.L. and Orion's proposed satellite at 47^0 W.L. PAS requested the Commission to analyze the interference issues and work with both parties to avoid excess interference from Orion into PAS-1. PAS also requested that nothing be done in the INTELSAT consultations that would prejudice the operation of PAS-1 at 45^0 W.L. and a PAS^0 satellite at 43^0 W.L.

7. In reply, Orion stated its willingness to accommodate the operation of PAS-1 to the maximum extent possible consistent with Orion's operational requirements and user needs. However, it maintained that PAS' request for relief was premature and that the Article XIV(d) technical consultations with INTELAST should be completed before PAS's interference concerns are addressed. Orion suggested that the interference situation would likely improve as a result of the measures that Orion would be taking in relation to INTELSAT.

8. PAS responded that the Article XIV(d) technical consultation process normally results in a binding agreement which can only be changed through new consultation. PAS therefore argued for resolution of the PAS/Orion interference issues prior to concluding the technical consultation with INTELSAT. PAS believed that any changes in Orion's design or operating parameters resulting from coordination with PAS would then be taken into account in the INTELSAT technical consultation.

9. Orion's September 5, 1989, technical modification contained changes in the technical and operational parameters of the Orion system that were made as a result of the completed technical consultation with INTELSAT. In its comments on these changes, PAS argued that, from a procedural standpoint, it should not be prejudiced by Orion's agreement with INTELSAT on technical parameters of its system which have not been approved through the Commission's normal application process. From a substantive standpoint, PAS maintained that Orion's satellite design continues to raise harmful interference concerns and key information is missing from the modified application. It argues that no Commission approval should be granted to Orion until Orion consults with PAS and resolves satisfactorily all interference concerns.

10. In reply, Orion contended that PAS's allegations of interference are not supported by sufficient analysis. It stated that all relevant information for performing interference analysis is incorporated by reference (INTELSAT Board of Governors document BG-80-33) in the application and available to PAS. Orion further stated that, in the event that Orion's 47^0 W.L. satellite is incompatible with the operation of PAS-1 at 45^0 W.L., PAS must yield to the Orion satellite in view of the condition the Commission placed on the PAS-1 authorization regarding full-frequency reuse. Orion believes that the likelihood of interference between Orion's 47^0 W.L. satellite and the proposed PAS-2 satellite at 43^0 W.L. is minimal because of the four degree spacing between the satellites and some of the operational constraints imposed by Orion as a result of the INTELSAT consultation process. It stated that the preferred solution to any interference problems is informal frequency coordination between the two parties.

11. PAS responded to Orion stating that it just obtained BG-80-33 from Comsat and intends to perform an interference analysis and file the results with the Commission at the appropriate time.[13] PAS rejected Orion's claim that its 45^0 W.L. satellite must yield to Orion at 47^0 W.L. PAS argued that full frequency reuse questions are distinct from the questions of interference among satellites that PAS is raising here. It maintained that the Commission should not take action upon Orion's application until PAS completes its interference analysis and Orion and PAS resolve satisfactorily PAS's interference concerns through informal discussions.

12. Orion opposed PAS's responsive pleading as an unauthorized filing which should not be accepted by the Commission.[14] Orion alleged that PAS is attempting to hold Orion hostage in the regulatory arena for competitive reasons under the guise of an interference analysis. It stated that PAS could have performed such an analysis long ago.[15] It further stated that the full frequency reuse condition on the PAS-1 authorization applies in a situation of interference between PAS-1 at 45^0 W.L. and Orion's full frequency reuse satellite at 47^0 W.L. Orion emphasized that it intends to accommodate the PAS-1 operations to the maximum extent possible and believes that the preferred solution is to coordinate the two systems through informal procedures.

B. Discussion

13. Upon review of the technical amendments submitted by Orion as a result of the INTELSAT Article XIV(d) consultations between INTELSAT and the United States and the United Kingdom,[16] we find that Orion's technical modifications satisfy the technical requirements established by the *Separate Systems* decision and are consistent with the conditions agreed upon between Orion and INTELSAT to achieve technical compatibility between the Orion and INTELSAT networks. The proposed facilities meet the Commission's standards for full frequency reuse and can be operated in a manner consistent with the Commission's rules and the international radio regulations. We find that the facilities will be compatible with the Commission's 2^0 orbital spacing policies. We further find that Orion's amended application is consistent with the conditions agreed to between Orion and INTELSAT to achieve technical compatibility between the Orion and INTELSAT networks.[17] Finally, we will condition Orion's license on operation of the facilities in accordance with the parameters and conditions agreed to during the INTELSAT technical consultation.

14. We disagree with PAS that final authorization of Orion should be withheld until Orion consults with PAS and all interference concerns are resolved satisfactorily. Nor do we believe that the Commission should step in at this time to resolve potential interference concerns. On such matters, we take the same approach with separate system operators as we do with our domestic satellite operators. We expect separate systems operators to attempt to resolve potential interference problems through informal coordination prior to seeking Commission involvement.[18] We believe that the satellite operators are better able to resolve such problems because they can best weigh the technical and economic tradeoffs involved in negotiating a coordination agreement. The Commission normally does not become involved unless the parties are unable to reach an agreement.[19] There do not appear to be any potential problems presented here that are insurmountable or that otherwise require Commission involvement at this time. PAS and Orion should be able to resolve all interference concerns through informal discussions with each other. If a coordination agreement cannot be reached after an exhaustive good faith effort, PAS and Orion may then request Commission intervention. However, delay of Orion's final authorization is unnecessary to this process and would be inconsistent with past practice.[20]

15. However, Orion is incorrect in asserting that PAS must yield at this time to the Orion satellite at 47^0 W.L. in view of the condition the Commission placed on the

PAS-1 authorization regarding full frequency reuse.[21] In authorizing use of the PAS-1 Ku-band transponders for service to Western Europe, the Commission granted PAS a waiver of the full frequency reuse requirements subject to the condition that PAS:

> shall be required to cease operation of its six 11/14 GHz transponders if the Commission finds that operation of another satellite facility complying with the full-frequency-reuse requirements would be incompatible with the operation of the Simon Bolivar satellite on these frequencies.[22]

The purpose of this condition is to ensure that a noncompliant satellite making use of the orbit/spectrum resource does not preclude the use of the resource by a satellite which does meet Commission full frequency reuse requirements.[23] However, we did not intend that the condition give a compliant operator a negotiating advantage in informal discussions to avoid harmful interference, nor did we intend it to mean that a compliant operator need not make concessions to reach agreement. We expect Orion and PAS to fully explore all reasonable measures to avoid harmful interference between their systems. Only as a last resort would we consider whether the condition imposed on PAS is applicable to the situation here and then only if it is clear that other remedies are clearly unavailable.

III. FINANCIAL DEMONSTRATION AND RELATED ISSUES

A. Background

16. Orion estimates that its satellite project will require an aggregate of approximately $416 million for the construction, launch and testing of the satellites plus launch risk insurance, interest during construction, pre-operating losses and additions to furniture and fixtures. Orion states that this amount includes a maximum contract price of $361 million for spacecraft construction, launch services and launch risk insurance under what it calls a turn-key contract for the in-orbit delivery of two satellites. Orion anticipates that an additional $21 million will be required for launch supplier interest costs (representing estimated interest charges for deferral of launch and insurance progress payments), $17 million for pre-operating losses and additions to furniture and fixtures, and $17 million for net capitalized interest during construction. On May 30, 1990, Orion filed a letter with the Commission stating that it estimates that it will cost an additional $17.4 million to cover first year operating expenses. This would raise Orion's total estimate to approximately $433 million.[24]

17. Orion proposes to finance the total cost of its system with a combination of debt and equity placements to be raised through a limited partnership organized under the Revised Uniform Limited Partnership Act of Delaware. The equity segment of the Financing Plan will be raised through the sale of interests in the limited partnership (Partnership) in which Orion proposes to be the General Partner, Commission licensee and manager of the day-to-day affairs of the venture. A Draft Limited Partnership Agreement describes the terms governing the entities participating in the equity segment. The debt segment is to be provided to the Partnership by Chase Investment Bank, Limited (Chase). Chase's obligation is outlined in a Term Sheet.

18. On April 24, 1990, the Common Carrier Bureau sent a letter to Orion seeking additional information and modifications to Orion's application for final authority to construct, launch and operate its proposed system. The letter stated that the additional information was necessary to satisfy the financial qualification standard established by the Commission in the *Separate Systems* decision[25] and for the Commission to determine whether Orion's financing arrangements are consistent with Sections 310(a)[26] and 308(c)[27] of the Communications Act, as amended. The modifications were considered necessary to resolve certain licensing concerns raised by Orion's financing structure. The letter asserted that the Bureau's review of the documents militated toward a finding that the Partnership, and not Orion, is the appropriate licensee.[28]

19. Further, the April 24 Bureau Letter expressed concern over the degree to which foreign entities, through their equity investment, affect control of the Orion satellite system under the terms of the Draft Limited Partnership Agreement. The letter indicated that Orion had informally told Common Carrier Bureau staff that up to seven of the eight Limited Partners may be foreign entities, including perhaps foreign governments. Under such arrangements, foreign entities (including perhaps foreign governments) would hold 87.5% equity of the Limited Partnership Interests, and have a greater than majority equity interest in the Partnership as a whole under the terms of the Draft Limited Partnership Agreement. This fact, along with certain terms of the Draft Limited Partnership Agreement, raised questions regarding the possibility that a bloc of such foreign entities, by themselves, could control policy and operational decisions on behalf of the Partnership.

B. Discussion

20. We find below that Orion has resolved the licensing concerns expressed in the April 24 Bureau Letter. A limited partnership arrangement with foreign equity investment is acceptable as a financing vehicle in this case, and Orion can hold the license, as long as Orion maintains full control of the satellite system. We further find that Orion's application as now constituted is consistent with Sections 310(a) and 308(c) of the Communications Act, as amended. Orion has provided the Commission with the identity and informal profiles of each of its proposed Limited Partners.[29] After receipt of this information, we consulted with executive branch agencies regarding any possible national security, foreign policy, or other concerns that may be raised by the participation of these entities as Limited Partners in this venture. We conclude that there is no statutory bar or policy reason to preclude the participation of any of these entities as a Limited Partner in this venture.[30] However, Orion has not yet fully satisfied certain aspects of the financial standard established by the *Separate Systems* decision. Accordingly, we will not grant Orion final authority to construct, launch and operate its satellite system until it has provided its final documentation and a financial showing consistent with this decision.

1. Licensing Arrangement

21. Orion's original application for a separate satellite system, filed in 1983, raised no issue of foreign ownership. However, such an issue is now present. As a general matter, we note that the Commission has explicitly held that the foreign ownership restrictions embodied in Section 310(b) of the Communications Act do not apply to non-common carrier satellite systems such as the one proposed by Orion.[31] Also, neither the Executive Branch White Paper[32] nor the Commission's *Separate Systems* decision[33] prohibit (or even discuss) foreign equity ownership in U.S.-licensed separate satellite systems. We find here potential public interest benefits from foreign capital investment in the Orion satellite system. First, we recognize that Orion will obtain necessary equity capital investment in consideration for foreign equity ownership in its system through the sale of Limited Partnership Interests. Second, the sale of Limited Partnership Interests to foreign entities may aid Orion in gaining commercially successful entry into key markets. We believe that this latter benefit is in the public interest as long as no exclusive arrangements are developed to preclude the entry of other separate satellite operators. Finally, we note that some foreign participation in the ownership, and even control,[34] of international transmission facilities is the norm, rather than the exception (i.e., common carrier and private submarine cables, INTELSAT and INMARSAT systems).

22. The April 24 Bureau Letter stated that the terms of the Draft Limited Patnership Agreement provided that the Limited Partners could exercise effective control of the Partnership's business and policy decisions. We believe that Orion has taken steps in response to this concern effectively to retain full control of its proposed system under the limited partnership structure. Orion has modified its Draft Limited Partnership Agreement using the Commission's broadcast attribution rules[35] as instructive to insulate its Limited Partners from the day-to-day operation and control of the satellite system.[36] In this way, Orion argues it will retain full control of the license in its capacity as General Partner and manager of the day-to-day business of the satellite system. For the purposes of this decision, we agree in theory that compliance with the Commission's broadcast attribution rules would ensure that Limited Partners are not "materially involved" in -- are insulated from -- the day-to-day business and policy decisions of the Partnership.[37] Thus, proper insulation of the Limited Partners would ensure that the Limited Partners cannot, at least under the terms of Orion's Draft Limited Partnership Agreement, exercise effective control of the Partnership's business and policy decisions.

23. Orion has taken the following actions to modify its Draft Limited Partnership Agreement to insulate its Limited Partners from control of the Partnership's business and policy decisions. First, the Draft Limited Partnership Agreement specifies that the General Partner, Orion, will "have full, exclusive, and complete discretion to manage and control the business." Second, Orion has amended its Draft Limited Partnership Agreement so that it now contains very specific language limiting the ability of the Limited Partners to exercise control of the system.[38] Finally, Orion has removed provisions in its Draft Limited Partnership Agreement to make its proposal more consistent with the Commission's broadcast attribution rules.[39] As a result, we find that the terms of the arrangements do not confer authority in the Limited Partners sufficient to constitute control of the system.[40] Hence, Orion can hold the license for this satellite system as long as it retains, in fact, full control of the business and policy decisions of the Partnership. If, however, circumstances arise in the future that demonstrate that, in the absence of prior Commission approval, Limited Partners exercise effective control over the Licensee's business and policy decisions, we will take appropriate enforcement action. *See, e.g.*, 47 U.S.C. § 312(a).[41]

2. Financing Arrangement

24. In the *Separate Systems* decision, the Commission adopted the domestic fixed-satellite financial qualification standard,[42] with certain procedural variations, for review of international separate satellite systems applications.[43] The Commission held that an international separate satellite system applicant must demonstrate its financial preparedness to assume the costs and liabilities involved in constructing, launching and operating its satellite system for one year in order to be granted final authorization for its proposed system. In particular, the Commission stated that financing must be fully committed, on a noncontingent basis.[44] The Commission applied to PAS a standard requiring demonstration of sufficient noncontingent funds to cover the costs to construct, launch and operate the first separate satellite system.[45]

25. The Commission further held that, generally, an otherwise qualified applicant will be granted permission to begin construction of the proposed system only upon a demonstration of: (1) the estimated costs of proposed construction and launch, and any other initial expenses for the proposed space stations; (2) the estimated operating expenses for one year after launch of the proposed space stations; and (3) the applicant's current financial ability to meet both the costs of construction and launch and operating expenses for one year after launch.[46] The Commission stated that, in order to meet the third requirement, new entrants:[47]

> . . . shall submit an exhibit indicating the estimated income or revenues anticipated from the proposed operation of the satellite system necessary to meet the estimated costs of construction, launch and operation, along with any additional information required by the Commission which would include: (1) scheduled debt financing or stock issues; (2) established lines of credit; or (3) other forms of internal financing.[48]

26. Orion has submitted the following documents in its demonstration that it is financially qualified to construct, launch and operate its proposed satellite system: (1) a Financial Plan describing the structure of Orion's financing; (2) a Draft Limited Partnership Agreement describing the terms governing the entities participating in the equity segment of the Financial Plan; (3) a Chase Underwriting Agreement and Term Sheet describing the terms whereby Chase commits to a $405 million senior debt credit facility that is fully underwritten by Chase[49] [Chase's commitment to provide the debt, however, is conditioned upon: (a) full subscription to the equity ($90 million); (b) Approved Contracts (for the sale of satellite capacity) for 24 transponders; and (c) a specific dollar amount to be included in the "Satellite Purchase Contract" whereby the prime contractor and/or subcontractors will be obligated to repay Chase in the event that successful in-orbit deliv-

ery of the satellites does not occur]; (4) letters from prospective Limited Partners indicating an intent to provide equity to the Partnership [Orion states that the General Partner and Limited Partners have committed to contribute $90 million in equity as their capital contribution, and have also committed to purchase capacity in the system in the amount of 24 transponders];[50] (5) an affidavit from Chris Visas, a director and the Corporate Secretary of Orion Network Systems, Inc. attesting to the authenticity of the copies of the letters from the Limited Partners; and (6) a letter from Chase attesting to the financial capacity of the prospective Limited Partners. In conclusion, Orion believes that these documents meet the Commission's financial qualification standard as that standard has been interpreted and applied by the Commission.

27. In its May 3, 1990 supplement to its financial demonstration, Orion states that the Chase commitment letter it has provided for the record is ample evidence of the "firm financial commitment" required by the Commission in licensing fixed-satellite space segment facilities. Orion states that the Chase commitment gives a greater measure of assurance of the certainty of Orion's debt financing than the example identified by the Commission when it adopted its noncontingent financial standard for domestic fixed-satellite service. Orion notes that the example given by the Commission as to what the Commission contemplates as an appropriate showing under this standard was a specific commitment letter stating that the lender, Citibank, was prepared to syndicate a loan to be available to the borrower, Federal Express Corporation.[51] Orion argues that the terms of the Citibank letter thus provided for a "major condition" -- that Citibank's commitment was subject to the successful syndication of $200 million of the $250 million loan.

28. By comparison, Orion argues that its commitment letter from Chase includes a much more complete set of provisions, including security arrangements, interest terms, repayment and prepayment structure, default events and covenants by the borrower. Orion states that its loan commitment, which is now binding on Chase since Orion accepted the terms of the arrangement on May 15, 1990, provides the Commission with greater assurance of the availability of the debt than the specified example of a "non-contingent, firm commitment" to which the Commission pointed when it adopted the prevailing standard for bank commitments to provide financing for domestic fixed-satellite applicants.

29. In other words, Orion argues that the Commission contemplates something less than a strict interpretation of the noncontingent financial standard when it reviews an applicant's financing arrangements for constructing, launching and operating for one year a domestic fixed-satellite. Orion is incorrect in this assertion. Although Orion correctly notes that the May 25, 1985, Citibank term sheet at issue in the Federal Express case provided that $200 million of Citibank's $250 million commitment was contingent upon sucessful syndication, the public file reveals a copy of a telex from Citibank to counsel for Federal Express (only 13 days after the May 25, 1985, letter) informing counsel that Citibank had sucessfully completed syndication of $220 million.[52] As a result, Citibank removed the "major condition" embodied in its commitment letter. Moreover, this contingency was removed more than two months before the Commission granted Federal Express final authorization to contruct, launch and operate its proposed satellite system and more than two months prior to the Commission's statement that the Citibank financial arrangement with Federal Express is an example of the type of credit arrangement contemplated by the Commission's rules.

30. Turning to the present case, Orion has provided estimates on both the costs of construction and launch of its proposed system and also the operating expenses for one year after launch of its proposed system. Upon review of the recently filed Draft Limited Partnership Agreement, the Chase Underwriting Agreement and Term Sheet, the letters from the prospective Limited Partners, and the additional supporting documents, we find that while Orion has provided documents with respect to the information requested, there still remain areas that are deficient in demonstrating that Orion has the current financial ability to meet the estimated costs under the noncontingent financial qualification standard established in the *Separate Systems* decision.

31. First, regarding Orion's equity demonstration,[53] only one letter contains sufficient language to demonstrate on its face a commitment to provide the equity for the Partnership.[54] The other letters from the proposed Limited Partners do not contain sufficient language clearly to demonstrate commitments to provide the required equity.[55] Moreover, half of the letters provided do not indicate how much equity will be committed.[56] Finally, four of the letters contain conditions that require further action of the parties that are not demonstrated to have been met at this time. These unmet conditions are inconsistent with the Commission's noncontingent financial standard.

32. Second, regarding Chase's obligation to provide the debt, we find that the proposed arrangement continues to rely on financing contingent on further performance by the parties. First, Chase requires that $90 million in equity be fully subscribed to by the Limited Partners before it will permit the Partnership to draw on the money it intends to provide. As discussed above, Orion has not sufficiently demonstrated that the equity is fully subscribed to at this time. Therefore, Chase's condition precedent is not satisfied. Second, Chase has also conditioned the drawing of its money on Approved Contracts for the sale of satellite capacity "in respect of" 24 transponders. Orion has not provided for the record a sufficient demonstration that this condition precedent is satisfied. Third, Chase has conditioned the drawing of its money on a requirement that a specific dollar amount be included in the "Satellite Purchase Contract" whereby the prime contractor and/or subcontractors will be obligated to repay Chase in the event that successful in-orbit delivery of the satellites does not occur.[57] Thus, we will condition Orion's final authorization upon a demonstration that all of the above conditions precedent are met.[58]

33. Finally, we note that Orion's financial demonstration is incomplete in a number of other areas. First, there is no provision that the Commission be notified before default although there is a security interest in the facilities. All domestic satellite authorizations contain this condition.[59] Second, the interest rate for the debt has not been provided for the record. We will further condition Orion's final authorization on the receipt of this information in the record as well.

34. In sum, although Orion has made progress since the April 24 Bureau Letter to bring its financial arrangements into line with the Commission's financial qualifications standard, the financial arrangements are still incomplete

and contingent in nature. We therefore find that Orion has not yet fully satisfied the financial qualification standard established in the *Separate Systems* decision. In this context, we note that although Orion believes the financial showing it has submitted should satisfy the Commission and allow it to grant an unconditional authorization, Orion recognizes that the Commission may wish to condition Orion's authorization upon receipt of firmer commitments of the equity. Orion contemplates that an escrow closing on the Limited Partner equity will occur in the near future. The escrow closing will incorporate the capital contributions and the execution of the Limited Partner subscription agreements and satellite capacity purchase agreements. Thus, Orion states that it would not object to conditioning its authorization on the filing of those documents within 90 days after the escrow closing.[60]

35. We find that Orion's financial arrangements would satisfy the financial standard established in the *Separate Systems Decision* should Orion demonstrate the following: (1) that the equity has been fully subscribed [by filing complete and irrevocable commitment letters that do not rely on further action of the parties]; (2) that Chase's conditions precedent to the drawing of its money have been satisfied [i.e., that the equity has been fully subscribed, that the requisite number of Approved Contracts for satellite transponders have been entered into, and that the specific dollar amount in the "Satellite Purchase Contract," under which the prime contractor and/or subcontractors will be obligated to repay Chase in the event that successful in-orbit delivery does not occur, is included in the record]; (3) the interest rate for the debt; and (4) that the Commission will be notified 10 days before default since there is a security interest in the facilities. Accordingly, we will give Orion 90 days from release of this decision to demonstrate compliance with the Commission's financial qualifications standard consistent with this Order.

IV. CONCLUSION

36. We conclude that Orion's technical amendments satisfy the technical requirements established by the *Separate Systems* decision and are consistent with the conditions agreed upon between Orion and INTELSAT to achieve technical compatibility between the Orion and INTELSAT networks. On the other hand, we conclude that Orion has not yet satisfied certain aspects of the financial qualification standard established by the *Separate Systems* decision. As a result, we require Orion to amend its application to demonstrate its current financial ability to meet both the costs of construction and launch and operating expenses for one year consistent with paragraph 35 above. Once these issues are resolved, we would be prepared to grant Orion final authority to construct, launch and operate its separate satellite system.

37. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and (j), 308, 309 and 319 of the Communications Act, as amended, 47 U.S.C. §§ 4(i) and (j), 308, 309 and 319, that the amended application (File No. CSS-83-002-P-M) of Orion Satellite Corporation (Orion) to construct, launch and operate two in-orbit Ku-band communications satellites is GRANTED, IN PART, and the conditional authorization issued to Orion on September 6, 1985,[61] is modified subject to: (1) the terms and conditions in this Order; (2) the technical specifications in the amended applications; and (3) the formal instruments of authorization to be issued at a later date upon completion of the procedures set forth in paragraph 38 below.

38. IT IS FURTHER ORDERED that Orion shall not begin construction and shall not launch or operate the satellites until it has amended its application as required in paragraph 35 above and the Commission issues an instrument of final authorization. Orion shall file this documentation within 90 days of the release of this Order.

39. IT IS FURTHER ORDERED that Orion shall file with the Commission the fully executed Limited Partnership Agreement within 30 days of execution.

40. IT IS FURTHER ORDERED that Orion must provide for the Commission the identity and a profile of any entity nominated as a new Partner at least 15 days prior to the vote on that Partner's admission into the Partnership.

41. IT IS FURTHER ORDERED that any and all amendments and/or modifications to the Limited Partnership Agreement, including the admission of any additional Partners, or an alteration of the percentages of equity subscribed to by each Partner, shall be filed with the Commission within 30 days of execution.

42. IT IS FURTHER ORDERED that Orion must file with the Commission complete information on any alteration of the ownership or voting control share profile of any Partner within 30 days of execution.

43. IT IS FURTHER ORDERED that Orion shall file with the Commission within 30 days of execution any and all contracts between Orion and any Partner with respect to the operation of the Orion satellite system (including, *inter alia*, contracts for customer support, marketing and related services).

44. IT IS FURTHER ORDERED that neither the Licensee, nor any persons or companies controlling or controlled by the Licensee, shall acquire or enjoy any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to construct or operate space segment or earth stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensee or any persons or companies controlling or controlled by the Licensee are parties.

45. IT IS FURTHER ORDERED that the conditional authority granted herein is specifically conditioned on operation of the Orion network in accordance with the parameters summarized and conditions described in Attachment Nos. 6 and 7 AP-14-9E, "Report by the Board of Governors to the Fourteenth Assembly of Parties Pursuant to Article XIV(d) Concerning the Use of the Orion Satellite System" (July 1989).

46. IT IS FURTHER ORDERED that the operation of Orion's system is to be restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public-switched message networks (except for emergency restoration service).

47. IT IS FURTHER ORDERED that the Commission shall retain jurisdiction over the use of all space segment within Orion's system to ensure compliance with the conditions of this authorization and with the Commission's rules, regulations and policies.

48. IT IS FURTHER ORDERED that Orion shall comply with the Commission's *Separate Systems* decision, 101 F.C.C. 2d 1046 (1985), as amended in the reconsideration orders, FCC 84-144 (released April 17, 1986) and FCC 86-471 (released October 31, 1986).

49. IT IS FURTHER ORDERED that Orion is temporarily assigned the orbital locations at 37.5 degrees West Longitude and 47.0 degrees West Longitude for operation of its proposed two in-orbit satellites.

50. IT IS FURTHER ORDERED that the temporary assignment of any orbital locations to Orion is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right of the use of the orbit or spectrum. Such a change may be ordered, *inter alia*, in the event that the national security or the public interest so requires, or to implement any of the objectives or policies set forth in the Commission's *Separate Systems* decision, *supra*. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

51. IT IS FURTHER ORDERED that as a condition of this Order, Orion shall file with the Commission copies of any operating agreements entered into by Orion within 30 days of execution.

52. IT IS FURTHER ORDERED that Pan American Satellite's (PAS) request that the Commission accept its December 12, 1989 reply pleading to Orion's September 5, 1989, modification to its application is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Orion Satellite Corporation, 101 FCC 2d 1302 (1985), Mimeo No. 6871 (released September 3, 1985). Orion is a wholly-owned subsidiary of Orion Network Systems, Inc., a U.S. corporation.

[2] Orion supplemented its technical filings on January 19, 1990, in response to a request for further information by the Chief, International Facilities Division of the Common Carrier Bureau. Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (January 19, 1990).

[3] Letter from Randolph C. Earnest, Director, Office of Satellite and Cable Policy, Department of State to George Li, Chief, International Facilities Division (August 30, 1989).

[4] Establishment of Satellite Systems Providing International Communications (*Separate Systems)*, 101 FCC 2d 1046 (1985), *on recon.*, 61 R.R. 2d 649 (1986)(*Reconsideration Order), further recon.*, 1 FCC Rcd 439 (1986).

[5] In its October 31, 1989, filing, Orion requested that the exhibit entitled "Orion Financial Plan" (Financial Plan) be withheld from public inspection as information of the type customarily guarded from competitors. Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (October 31, 1989). *See infra* note 6.

[6] Orion requested that these documents also be withheld from public inspection. Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (December 19, 1989). The documents are entitled: (1) Draft and Restated Agreement of Limited Partnership (Draft Limited Partnership Agreement); and (2) Draft Agreement with Chase Investment Bank, Limited.

On April 24, 1990, the Chief, Common Carrier Bureau informed Orion that it could not honor Orion's request for confidentiality of the above-mentioned documents, as well as its Financial Plan, *supra* note 5, because it found that Orion had not met its burden. *See* Letter from Richard M. Firestone, Chief, Common Carrier Bureau to Thomas J. Keller (Counsel for Orion) (April 24, 1990)(April 24 Bureau Letter). In response to the Bureau's determination, Orion has filed an application for review with the Commission. Orion Satellite Corp., File No. CSS-83-002-P-(M), Application for Review (filed May 1, 1990). Orion's application for review will be addressed separately.

[7] Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau (May 3, 1990); Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 11, 1990); Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 14, 1990); Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau (May 18, 1990); Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 18, 1990); Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 30, 1990).

Orion requests that the revised Draft Limited Partnership Agreement, portions of the Chase Term Sheet and portions of the letters from the prospective Limited Partners, all of which are included in the above-mentioned filings, be withheld from public inspection. This issue will be addressed separately.

[8] Pan American Satellite (Initial Conditional Authorization), 101 FCC 2d 1318 (1985); Modified Conditional Authorization, FCC 86-257 (May 21, 1986); Final Authorization (C-band transponders), 2 FCC Rcd 7011 (1987); Further Conditional Authorization (Ku-band transponders), 3 FCC Rcd 677 (1988); Final Authorization (Ku-band transponders), 3 FCC Rcd 6474 (1988); International Satellite, Inc. (Initial Conditional Authorization), 101 FCC 2d 1201 (1985); Cygnus Satellite Corporation (Initial Conditional Authorization), 101 FCC 2d 989 (1985); Modified Conditional Authorization, Mimeo No. 0262 (October 22, 1985); RCA Americom (Initial Conditional Authorization), 101 FCC 2d 1342 (1985); Financial Satellite Corporation (Initial Conditional Authorization), FCC 86-13 (January 15, 1986); Columbia Communications Corporation, FCC 86-536 (December 16, 1986); McCaw Space Technologies, Inc., FCC 87-1 (January 15, 1987).

[9] *See* Letter from George P. Shultz, Secretary of State, and Malcolm Baldridge, Secretary of Commerce, to Chairman, Federal Communications Commission (dated November 28, 1984). This joint letter required that the two restrictions mentioned be imposed on separate systems prior to final authorization.

[10] *See* Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (February 15, 1990).

[11] Letter from George Li, Chief, International Facilities Division to Thomas J. Keller (Counsel for Orion) (January 31, 1989).

[12] Orion's amendment provided a modified frequency and transponder plan, modified maximum spectral power density values in the uplink direction, modified television carrier frequencies, modified spectral power density values in the downlink direction, revised beam coverages, and eliminated the use of the 11.45-11.7 GHz band in the U.S. for global service as previously proposed. Orion also supplied a general description of the connectivity capabilities of the proposed satellites.

[13] PAS stated that BG-80-33 was not incorporated by reference in Orion's September 5 modification and was not available at the Commission as a public document.

[14] We will grant PAS's request that we accept its responsive pleading. The pleading clarifies PAS's position in view of Orion's reply pleading and our acceptance of its does not otherwise delay Commission action on Orion's application.

[15] Orion states that relevant Board of Governors documents were available to PAS and anyone else after the July 1989 INTELSAT Assembly of Parties.

[16] Orion also modified its satellite design to enable it to provide domestic service to certain locations in Africa by means of spot beams. However, Orion stated that it will not provide international service to and from points in Africa until it receives authorization from the Commission and completes the requisite consultation with INTELSAT. Letter from Thomas J. Keller (Counsel for Orion) to George Li, Chief, International Facilities Division (January 19, 1990).

[17] *See* INTELSAT Assembly of Parties Record of the Fourteenth (Extraordinary) Meeting, AP-14-9E, Attachment Nos. 6&7, July 12, 1989.

[18] *See* Assignment of Orbital Locations to Space Stations in the Domestic-Fixed Satellite Service, 5 FCC Rcd 179, para. 32 (1990).

[19] *See, e.g.*, GE American Communications, Inc., 3 FCC Rcd 6871, note 8 (1988); Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed Reg. 35228, note 33 (1985).

[20] There is no reason to treat Orion's application any differently than the Commission previously treated PAS's application for the PAS-1 satellite. In commenting on the PAS-1 application, Orion requested that the Commission not authorize the proposed facility until it was determined that there would be no harmful interference to Orion's proposed satellite at the 47^0 W.L. location. The Commission declined to delay action on PAS-1, noting that the PAS facility could be operated without causing undue interference and that coordination between PAS and Orion would still be necessary. Pan American Satellite (Modified Conditional Authorization) *supra* note 8, at paras. 43-47. Subsequently, the Commission proceeded with INTELSAT Article XIV(d) consultation of PAS-1 and issued a final authorization, Pan American Satellite (Final Authorization) 2 FCC Rcd 7011 (1987).

[21] In the *Separate Systems* decision, 100 FCC 2d at paras. 248-255, the Commission decided to apply to separate international satellite systems a variation of its domestic satellite full frequency reuse requirements in order to ensure the most efficient use of the orbit/spectrum resource. The Commission required that these satellites: (1) be equipped with transponders capable of using at least 800 MHz of each 1000 MHz of assignment in any band; (2) employ polarization discrimination in order to reuse both the uplink and downlink frequency bands; and (3) be capable of simultaneous operation on all assigned frequencies in all beams (for satellites serving widely separated geographic areas without serving intervening areas in the same bands).

[22] Pan American Satellite, Final Authorization (Ku-band transponders), 2 FCC Rcd 7011, para. 22 (1987).

[23] *See* Pan American Satellite (Modified Conditional Authorization), *supra* note 8, at para. 41; Further Conditional Authorization (Ku-band), FCC 88-30 at para. 14 (February 16, 1988).

[24] *See* Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 30, 1990).

[25] In particular, the Bureau stated that "Orion must provide for the record: (1) fully negotiated, complete and finalized documents; (2) a demonstration of full subscription to the Limited Partnership Interests (equity), on a noncontingent basis; (3) identification of all of the Limited Partners and the amount of equity each has committed; (4) a demonstration that the debt is fully committed, on a noncontingent basis; (5) identification of the creditors for the debt and the amount each committed; (6) all Approved Contracts with the Limited Partners; (7) any agreement between the bank and the Partnership for locating financing; and (8) provisions in the loan documents that the Commission be notified before default if there is a security interest in the facilities." *See* April 24 Bureau Letter, *supra* note 6.

[26] Section 310(a) of the Communications Act, as amended, provides that "[t]he station license required under this Act shall not be granted to or held by any foreign government or the representative thereof." 47 U.S.C. § 310(a) (1988). If a foreign government or the representative thereof has either *de facto* or *de jure* control of the license, it would be deemed to hold the license.

[27] Section 308(c) of the Communications Act, as amended, provides that "[t]he Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 2 of an Act entitled 'An Act relating to the landing and operation of submarine cables in the United States,' approved May 24, 1921." 47 U.S.C. § 308(c) (1988).

[28] The terms of the documents submitted by Orion in its financial demonstration initially provided: (1) that the Partnership will provide the satellite communications services; (2) that the assets are to be held by the Partnership; (3) that the Partnership will receive the monies and profits from the operation of the system; (4) that the Partnership is obligated to repay the debt; and (5) that the Limited Partners may advise, consult, and vote on certain business and policy decisions made with respect to the Partnership's communications services.

[29] Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 11, 1990).

[30] In order to assess compliance with Sections 310(a) and 308(c) of the Communications Act, as amended, in the future, we will require Orion to file with the Commission its executed Limited Partnership Agreement. Additionally, any amendments or modifications to its Limited Partnership Agreement, including the admission of any additional Partners, or an alteration of the percentages of equity subscribed to by each Partner, must also be filed with the Commission. Further, if the ownership or voting control share profile of any Partner is altered, Orion must provide for the Commission complete information on these changes. Finally, Orion must provide for the Commission the identity and profile of any entity nominated as a new Partner at least 15 days prior to the vote on the Partner's admission into the Partnership.

[31] *Separate Systems*, 101 FCC 2d at para. 232. However, Section 310(a) of the Communications Act does not make a common carrier/non-common carrier distinction.

[32] The White Paper does state that "the Executive Branch has weighed the possibility some foreign governments might consider dictating procurement requirements in exchange for permitting non-INTELSAT satellite systems to access their markets. The United States would oppose any initiative by foreign administrations which would discriminate against U.S. aerospace firms. The United States does not wish to regulate the procurement decisions of noncommon carrier, satellite systems. The United States would consider declining to consult on proposals involving unacceptable procurement provisions that could adversely affect competition in the aerospace industry." *See* Senior Interagency Group, White Paper on New International Satellite Systems 42 (1985); H.R. Rep. No. 471, pt. 1, 99th Cong., 2d Sess. 22-33 (1986).

[33] The Commission stated that " . . . we will, however, require, as a condition in the authorization orders, separate satellite system operators to file any operating agreements they enter into with foreign entities with the Commission and will reconsider the authorizations of satellite system operators who enter an operating agreements (sic) with satellite procurement restrictions." *Separate Systems*, 101 FCC 2d at para. 215.

[34] At this time, there is no foreign control of the Orion satellite system. *See infra* note 40 and accompanying text.

[35] Attribution of Ownership Interests, 97 FCC 2d 997 (1984); *on recon.* 50 Fed. Reg. 27438 (1985); *further recon.*, 1 FCC Rcd 802 (1986). Under the broadcast attribution rules, properly insulated Limited Partners will be relieved from attribution of ownership for the purposes of the broadcast multiple ownership requirements. Attribution of Ownership Interests, 97 FCC 2d at 1023.

[36] Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau at page 6 (May 3, 1990).

[37] Compliance with the Commission's broadcast attribution rules would, by definition, remove elements of control that might otherwise be associated with Limited Partners. The "no material involvement" standard restricts Limited Partner involvement beyond that which is otherwise permissible under the Revised Uniform Limited Partnership Act (RULPA) before Limited Partner involvement rises to the level of "control" for liability purposes. *See* Revised Uniform Limited Partnership Act § 303(b) (1976).

[38] For instance, the Draft Limited Partnership Agreement provides that no Limited Partner shall take part in the day-to-day management, operation or control of the business and affairs of the Partnership or have any right, power, or authority to act for or on behalf of or to bind the Partnership or transact any business in the name of the Partnership. Moreover, with one limited exception, *see infra* note 41, no Limited Partner shall act as an employee of the Partnership, as an independent contractor or agent of the Partnership, or become actively involved in the management or operation of the Partnership. Furthermore, the Limited Partners are barred from communicating with the General Partner on matters pertaining to the day-to-day operations of the Partnership's communications satellite facilities. Finally, the Limited Partners cannot remove the General Partner until an Independent Party has made a for "cause" (actual fraud, gross negligence, or willful misconduct) determination.

[39] For example, Orion removed provisions in its original draft that permitted the Limited Partners to consult and advise the General Partner on Partnership policy and planning matters.

[40] We find that since Orion as General Partner retains full control of the Partnership, and that the license is held by Orion, a U.S. corporation, issues under Section 310(a) of the Communications Act, as amended, are resolved at this time. Further, since Section 310(b) of the Communications Act, as amended, does not apply in this case, *see supra* note 31 and accompanying text, we note that nothing in this decision modifies our consideration of alien limited partners under sections 310(b)(3) and (4) of the Communications Act. *See* Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310(b)(3) and (4) of the Communications Act of 1934, as amended, 103 FCC 2d 511 (1985), *on reconsideration*, 61 R. R. 2d 298 (1986).

[41] We note that the Draft Limited Partnership Agreement provides that the General Partner can separately contract with the Limited Partners for the provision of customer support, marketing and related services so long as the contracts are non-exclusive and that any sales to customers are governed by contractual terms and conditions set by the General Partner. Although this feature does not fully meet the "no material involvement" standard of the Commission's broadcast attribution rules, we find at this time that this provision sufficiently constrains the ability of Limited Partners, in this private system, to control the business of the Partnership. However, in order to assess any involuntary transfer of control issues that may arise under the terms of separate contractual arrangements between Orion and its Partners, we will require Orion to file with the Commission any and all contracts between Orion and any of its Partners with respect to the operation of the Orion satellite system (including, *inter alia*, contracts for customer support, marketing and related services).

[42] *Separate Systems*, 100 FCC 2d at para. 235; *Reconsideration Order*, 61 R. R. 2d at para. 40. The domestic fixed-satellite financial qualification standard was established in *Domestic Fixed - Satellite Service*, 50 Fed. Reg. 36071 (1985).

[43] The Commission adopted a two-stage approach for review of an applicant's financial qualifications for an international separate satellite system. It recognized " . . . the fact that the applicant must undergo the INTELSAT consultation process and the resulting continued uncertain status of the application pending this process means that the applicant is unlikely to receive from any banking or financial institution irrevocable financial commitments until consultation process is completed." 101 FCC 2d at para 234. Indeed, recognizing the difficulty in establishing noncontingent financing arrangements for international separate satellite systems (*e.g.*, international negotiations, large costs, etc.), the Commission has, at the request of separate system applicants, granted extensions of time in order to demonstrate an applicant's current financial ability to meet its estimated costs to construct, launch and operate for one year its satellite system. *See, e. g.*, International Satellite, Inc., Financial Satellite Corporation, 5 FCC Rcd 35 (Com. Car. Bur. 1990); Pan American Satellite, 2 FCC Rcd 3803 (Com. Car. Bur. 1987); Pan American Satellite Corporation, FCC 86-257 (released May 21, 1986).

[44] *Id.* (" . . . the resulting continued uncertain status of the application pending the (INTELSAT consultation) process means that the applicant is unlikely to receive from any banking or financial institution *irrevocable financial commitments* ....") (emphasis added).

[45] *See* Pan American Satellite, 2 FCC Rcd 7011, 7012 (1987). PAS's initial attempt to demonstrate its financial qualifications under the Commission's standard was rejected because it had not provided "any committed funds or assets presently available to cover the costs of construction." The Chief, Common Carrier Bureau, stated that "any documents of credit arrangements . . .

must show committed funds which do not require any further action by either party. Similarly, equity or debt financing . . . must also be executed and noncontingent." *See* Letter from Albert Halprin, Chief, Common Carrier Bureau, to Norman P. Leventhal, Esquire (November 14, 1985).

[46] *Separate Systems*, 101 FCC 2d at para 234.

[47] The Commission distinguishes between two classes of entities for purposes of demonstrating the applicant's current financial ability. The first consists of established entities with existing assets and operating income sufficient to meet the estimated construction, launch and operating costs. For these entities, the Commission requires the submission of a verified balance sheet together with supporting documentation showing that current assets and existing operating income are sufficient to meet estimated costs. The second group identified by the Commission consists of "newly established entities unable to submit a current balance sheet." *Id.* at para. 235.

[48] *Id.*

[49] On May 18, 1990, Orion filed with the Commission a supplement indicating that Orion formally accepted the Chase financial commitment in the amount of $395 million, instead of $405 million. Orion explains that the difference is due to a reduction in certain projected expenses as a result of further analysis and review by Orion and its financial advisors. Orion states that all other terms and conditions of the financing commitment are the same. *See* Letter from Thomas J. Keller (Counsel for Orion) to Donna R. Searcy, Secretary, FCC (May 18, 1990).

[50] *See* Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau, page 2 (May 3, 1990).

[51] *See Domestic Fixed - Satellite Service*, *supra* note 42 at note 28. *Citing* Federal Express Corporation, Amended Application, File Nos. 945-DSS-P/LA-84, 946-DSS-P/LA-84, 947-DSS-P-84 (June 7, 1985).

[52] *See* Telex from Citibank to Dave Anderson, Reference No. 142509 (June 7, 1985) in Federal Express' Amended Application *supra* note 51.

[53] Copies of the purported commitment letters are attached to Orion's May 3, 1990 filing. *See* Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau, Appendix 3, Attachments A-F (May 3, 1990).

[54] *See* Attachment A.

[55] Indeed, Attachment B only " . . . confirms the willingness..." of the proposed Limited Partner; Attachment C " . . . is to confirm (the) present intent . . . " of the Limited Partner; Attachment D " . . . confirms the commitment . . . " to invest in the Partnership, without indicating how much it is committing; and Attachment E provides that the Board of Directors of the Limited Partner has approved its participation in the partnership as a Limited Partner and therefore, " . . . the partners to this memorandum agree to proceed in good faith with the formation of the (Partnership) by negotiation and execution of a Limited Partnership Agreement and such other documents necessary to consummate the transaction."

[56] *See* Attachments D-F.

[57] Chase Term Sheet at page 7. Orion states that it is anticipated that this condition precedent will necessarily be met within the very near future with the signing of the final Satellite Purchase Contract. *See* Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau (May 18, 1990).

[58] Further, the Chase letter attesting to the financial capacity of the prospective Limited Partners and the Chris Visas affidavit do not demonstrate that the conditions precedent have been satisfied. Rather, the Chris Visas affidavit does nothing more than suggest that the "commitment" letters from the proposed Limited Partners are true and correct copies of the originals. Furthermore, the Chase letter only finds that the proposed Limited Partners have the financial capacity to contribute the equity, not that Chase believes that the proposed Limited Partners are fully committed, on a noncontingent basis. In other words, the Chase letter does not conclude that the conditions precedent to the drawing of the money it intends to provide are satisfied.

[59] *See* Telex from Citibank to Dave Anderson in Federal Express' Amended Application *supra* note 51.

[60] *See* Letter from Thomas J. Keller (Counsel for Orion) to Richard M. Firestone, Chief, Common Carrier Bureau, page 5 (May 3, 1990).

[61] Orion Satellite Corporation, File No. CSS-83-002, Mimeo No. 6871 (released September 6, 1985).

SEPARATE STATEMENT BY COMMISSIONER ANDREW C. BARRETT

RE: ORION SATELLITE CORPORATION'S REQUEST FOR FINAL AUTHORITY TO CONTRUCT, LAUNCH AND OPERATE AN INTERNATIONAL COMMUNICATIONS SATELLITE SYSTEM (File No. CSS-83-002-P-(M))

In its 1985 *Separate Systems* decision, the Commission established policies and procedures for the condiseration of applications to construct, launch and operate private satellite systems that would provide international communications services separate for INTELSAT.[1] Since that time, serveral separate systems applications have been authorized by the Commission. I am encouraged by the growing interest in our *Separate Systems* procedures.[2] In a private market confronted with increasing global communications demands, I would hope that parties continue to pursue viable opportunities for separate systems.

This *Order* grants to Orion Satellite Corparation (Orion) a conditional authorization to construct, launch and operate two in-orbit Ku-band communications satellities. The *Order* concludes that Orion's technical amendments satisfy the technical requirements established by the *Separate Systems* decision and are consistent with the conditions agreed upon between Orion and INTELSAT. The *Order* also concludes that Orion has not yet fully satisfied the financial qualification standard established in the *Separate Systems* decision. As a result, Orion is required to satisfy these financial conditions within 90 days of the release of this *Order*. [3] Finally, the *Order* requires a number of safeguards and reporting conditions to ensure that Orion, as the U.S. licensee, retains *de facto* and *de jure* control over the separate systems entity.[4] While I support the above actions and conditions, I believe there is one issue in this *Order* which will need to be addressed more fully in the future: the issue of foreign investment.

As the *Order* indicates, neither our *Separate Systems* decision nor the Executive Branch White Paper discuss the issue of foreign equity ownership in U.S. licensed separate satellite systems.[5] Thus, the Commission has no prior guidance from the *Separate Systems* docket on the subject of foreign investment. Nor does the Commission

have a formal record of interagency concerns (i.e., Departments of State, Commerce, Treasury or Defense) with respect to foreign investment.[6] Therfore, at this point, the Commission reviews the implications of separate systems foreign investment on a case-by-case basis. To the extent the Commission conducts such a case-by-case review, I believe we should consult other governmental agencies early in the review process. Where separate systems applications involve foreign investment, in believe such applications raise potential international political, economic and security concerns. As a result, I believe in-depth consultation with other government agencies should be conducted early in our review process, where appropriate. Such consultations will make the Commission more aware of sensitive international policy concerns. To the extent those concerns impact a separate system authorization, I think it is important to identify such issues as early as possible.[7]

FOOTNOTES FOR STATEMENT

[1] *See Establishment of Satellite Systems i viding International Communications* (Separate Systems), 101 FCC 2d 1046 (1985), *on recon.*, 61 R.R. 2d 649 (1986), *further recon.*, 1 FCC Rcd 439 (1986).

[2] *See Order* at 3 n.8.

[3] *See Order* at 22.

[4] The *Order* cites the Commission's enforcement authority under Sections 308(c), 310(a) and 312 of the Communications Act to impose reporting conditions and ongoing compliance requirments on Orion and its Partners. *See Order* 12 and 15.

[5] *See Order* at 13.

[6] In addition to the Executive Branch White Paper, the Departments of Commerce and State have provided input with respect to our Separate System considerations in the past. *See Order* at 4.

[7] I note that prior to the release of this *Order*, the Commission initiated an interagency review through the National Telecommunications and Information Administration (NTIA) at the Department of Commerce. Although this action occurred later in the review process than I would have preferred, I am pleased with this effort. Thus, my support for this item. *See Order* at 12.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-337

In the Matter of

Regulation of International
Accounting Rates

NOTICE OF PROPOSED RULE MAKING

Adopted: July 12, 1990; Released: August 7, 1990

By the Commission:

I. INTRODUCTION

1. The U.S. net settlements deficit for international telecommunications traffic grew from approximately $40 million in 1970 to $2 billion in 1988, with perhaps $1 billion of this deficit being a direct underwriting by U.S. consumers of foreign telecommunications administrations.[1] In this proceeding, we tentatively conclude that the above-cost international accounting rates that provide the basis for those overpayments deter U.S. carriers from making further reductions in U.S. calling prices. As a result, we hereby initiate a Rule Making proposing to modify our regulation of the international accounting rates that U.S. carriers use to settle accounts with foreign telecommunications administrations in order to promote lower, more cost-based, international accounting and collection rates.[2]

II. BACKGROUND

A. Commission Settlements Policy

2. The Commission has regulated U.S. carrier participation in international accounting and settlement arrangements for more than fifty years in a series of proceedings beginning with *Mackay Radio* [3] in 1936, continuing with *TRT* [4] in 1974 and *Uniform Settlements* in 1980,[5] and culminating in the adoption of the Commission's existing International Settlements Policy (ISP) in 1986.[6] In its 1980 decision, the Commission reaffirmed the traditional view that the public interest is served by a policy requiring uniform settlement agreements for international record carriers on parallel international routes.[7]

3. Although the Commission's regulatory oversight concerning international accounting and settlement arrangements has evolved over time, the traditional focus of the Commission's regulation was largely to prevent the "whipsawing" of competing U.S. international record carriers (IRCs).[8] In *Uniform Settlements*, the Commission observed that the nature of the international message telephone service (IMTS) market at that time, including the fact that traffic for IMTS is predominantly outbound from the United States, appeared to limit the ability of foreign telecommunications administrations to play U.S. carriers off against each other to the disadvantage of the U.S. carriers and U.S. ratepayers. Nevertheless, the Commission concluded for the first time in 1986 that the ISP should apply to international voice services. Only in 1987 did the Commission begin to focus on the absolute level of international accounting rates and the potential adverse effect of the high level of international accounting rates on U.S. consumers.[9] While the Commission did not propose any action concerning the issue of international accounting rates, the Commission explicitly reserved the right to consider additional regulatory action as necessary in the context of its continuing review of these issues.[10]

B. " New Developments "

4. Despite the effort the Commission has made thus far to focus attention on the issue of high international accounting rates, high calling prices to the United States, and the substantial U.S. IMTS-based balance of payments deficit, there has been little evidence that the situation is improving. To the contrary, the U.S. net settlements deficit increased 17.3 percent in 1988.[11] Moreover, the weighted average accounting rate for international common carrier services remained roughly the same in 1988.[12]

5. Furthermore, concerns have been raised for the first time concerning the potential whipsawing of U.S. voice carriers. AT&T, for example, asserts that a new arrangement for delivering inbound IMTS has been introduced into the marketplace.[13] AT&T notes that under this arrangement, foreign callers use international private lines to access the U.S. domestic switched network, with the foreign caller paying only the U.S. domestic rate plus the cost of the international private line. AT&T contends that these new arrangements will permit foreign carriers to avoid paying the IMTS accounting rate. AT&T notes that U.S. callers cannot similarly access other countries' domestic networks. AT&T asserts that this could lead to a drastic decrease in inbound accounting rate revenues accruing to U.S. carriers under traditional IMTS accounting and settlement arrangements, and could eventually force U.S. callers to pay higher rates for international calling. As a result, AT&T asserts that these new arrangements should be declared violative of the ISP[14] and an unreasonable practice in violation of Section 201(b) of the Communications Act.[15] TRT, now TRT/FTC, has expressed similar concerns and sought similar relief in a petition requesting a ruling as to the applicability of the ISP to packet switched data services between the United States and Bermuda using different protocols for international transmission.[16]

III. DISCUSSION

A. Competition in International Telecommunications

6. Section 1 of the Communications Act directs the Commission to exercise its regulatory authority over interstate and foreign telecommunications

> so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . .

47 U.S.C. § 151. The Commission has sought to carry out the statutory mandate set forth in Section 1 by establishing an increasingly competitive market structure in domestic and international telecommunications. As a result, the Commission has provided for open entry in the provision of interstate long distance[17] and international[18] services. Moreover, substantial regulatory effort has been required to address the cost and repricing issues associated with the introduction of competition in the interstate long distance market.[19]

7. We recognize, however, that all of the cost and pricing issues associated with the introduction of competition into the U.S.-based international telecommunications services market have not yet been finally resolved. In establishing this proceeding, we tentatively conclude that we should consider modifications to our regulatory policies in order to promote lower, more cost-based, international accounting rates and calling prices. Moreover, we tentatively conclude that in examining these issues we should be guided by the same types of objectives that we have used in the past to examine repricing issues, such as: (1) universal service;[20] (2) the prevention of uneconomic bypass;[21] (3) the encouragement of network efficiency;[22] and (4) the elimination of unjust discrimination or unlawful preferential rates.

8. We believe that by pursuing these, and other, longstanding regulatory objectives we will promote the goals established by this Commission, that include, *inter alia*, encouraging the development of a competitive, innovative and excellent American communications system and promoting the vital interests of the American people in international communications. At the same time, by establishing this proceeding, we make clear our concern that the strides that have been made toward fulfilling longstanding regulatory objectives, such as ensuring universal service,[23] eliminating unjust or unlawful preferences,[24] preventing uneconomic bypass,[25] and encouraging network efficiency, may be imperiled by the current above-cost international accounting rate structure. In particular, we are concerned that although U.S. IMTS prices may appear relatively low in comparison to foreign calling prices to the United States,[26] the above-cost international accounting rate structure appears to be a primary reason that U.S. international calling prices are significantly higher than U.S. domestic rates. Moreover, we are concerned that high IMTS calling prices place pressure on our structure of universal service, deter economic efficiency and create a strong incentive to bypass the international public switched telephone network. We invite parties to comment on the objectives discussed above, additional or alternative objectives, and our tentative conclusion that such objectives should guide the establishment of our regulatory policies in this area.

B. ISP Reform Proposals

9. In light of our findings above, we tentatively conclude that lower, more cost-based international accounting and collection rates should be the focus of our regulatory effort. We must implement meaningful and timely reform of the existing international accounting and settlement arrangements. We cannot continue to underwrite foreign telecommunications administrations, particularly in developed countries that have per capita incomes that rival or exceed those of the United States, and thereby endanger the substantial, hard-won gains that have been achieved by U.S. government and industry.

10. Specifically, we propose a three-part reform of our existing international settlements policy to bring international accounting rates closer to the cost of providing international telecommunications services and to reduce U.S. international calling prices by perhaps as much as fifty percent. We believe that the proposed approach will permit countries, such as the United Kingdom, that have regulatory bodies that have expressed an interest in lower, more cost-based international accounting rates to expedite such reductions.[27] Moreover, we trust that the proposed approach will encourage foreign telecommunications administrations that have unusually high IMTS accounting rates with the United States, such as the telecommunications administration in Hong Kong, to lower such accounting rates to more cost- based levels.[28] Similarly, we hope that the proposed approach will encourage countries, such as the Federal Republic of Germany, that have traditionally had very high IMTS calling prices to the United States and "stable" accounting rates to implement accounting rate and calling price reductions for IMTS with the United States on an expedited basis.[29]

1. Notification

11. First, we propose to remove any existing or potential regulatory impediments to lower, more cost-based accounting rates for international telecommunications services. While in recent years the Commission has granted numerous waivers for lower accounting rates for international telecommunications services, we recognize that oppositions from competing carriers may slow the timely introduction of lower, and more competitive, accounting rates[30] and may result in higher,[31] rather than lower, calling prices for U.S. consumers.[32] Moreover, we recognize that even absent opposition, U.S. carriers may have to wait more than two months for an accounting rate reduction to become effective under existing rules.[33]

12. As a result, we propose adding a new procedural option to our present oversight under the ISP of U.S. carrier international accounting and settlement arrangements. Specifically, in order to remove any existing or potential U.S. regulatory impediments to lower, and more cost-based, accounting rates, we propose the implementation of a notification option for simple reductions in the accounting rate with a single foreign telecommunications administration rather than requiring carriers to seek a waiver of the ISP.[34] Under this proposed option a U.S. carrier would be required to file a letter with the Commission noting: (1) the applicable international service,[35] (2) the foreign telecommunications administration; (3) the present accounting rate; (4) the new accounting rate; (5) the prospective effective date;[36] (6) that the accounting rate will be divided 50-50; and (7) that there has been no other change in the operating agreement with the foreign correspondent.

13. Moreover, under the proposed notification approach, an exclusive arrangement would not be permitted – that is, if a foreign telecommunications administration implements a lower accounting rate with one U.S. carrier, it must be prepared to offer the same rate to all U.S. carriers serving that country. Furthermore, under the proposed notification approach, U.S. carriers would be required to "accept" only their proportionate share of return traffic from a given country. Finally, in order to ensure compliance with these rules, U.S. carriers would be required to incorporate sworn statements concerning these non-exclusivity and proportionate return require-

ments into their notification letters.[37] We invite parties to comment on this proposed notification option, including the likelihood that a notification option alone will result in lower, and more cost-based, international accounting rates.[38]

2. Waiver Requests

14. Second, we propose to streamline our examination of ISP waiver requests by reducing, where possible, the amount of time necessary for review. Specifically, we propose to apply a 21-day waiver review procedure to the international telecommunications services currently subject to the ISP.[39] Moreover, we propose to give more definitive guidance to the Common Carrier Bureau concerning whether to grant such requests.

15. At present, the ISP provides that waivers may be granted if there is a possibility of lower collection rates, improved services, or increased competition. We seek comment, however, on our proposal to establish definitive criteria for determining whether a waiver should be granted or denied. Under this proposed approach we would expect to grant waivers only if there is a change that results in a more cost-based accounting rate.[40] In order to make clear our view that international calling prices have remained too high under existing accounting and settlement arrangements, however, we propose to demonstrate our strong interest in international calling price reductions by relying on a single additional criterion -- that is, whether there is a firm carrier commitment to lower international calling prices. We invite parties to comment on this proposed approach, including whether the commitment to lower calling prices should apply to the U.S. carrier, its foreign correspondent, or both, and how such a commitment could best be implemented.[41] We also invite parties to comment whether additional criteria should be considered and, if parties believe such additional criteria are necessary or desirable, to provide specific suggestions. In this context, we note, however, that under our proposed waiver approach we would expect to deny certain types of waiver requests, such as non-cost-based increases in, or surcharges to, the accounting rate,[42] or less than a 50 percent share for the U.S. carrier,[43] that have been received under the existing waiver criteria. As a result, we would ask parties to propose additional criteria only if such criteria would directly promote one or more of the objectives set forth in this proceeding.

3. Establishment of Rates

16. Third, we propose exploring the use of existing International Telecommunication Union (ITU)[44] Regulations and International Telegraph and Telephone Consultative Committee (CCITT) Recommendations to promote reductions in international collection and accounting rates between the United States and other countries. In particular, we invite parties to comment on the extent to which Articles 6.1[45] and Articles 6.2[46] of the new International Telecommunication Regulations serve as a basis for seeking bilateral collection and accounting rate reductions between the United States and other ITU member countries. Specifically, we invite parties to provide information on the average total cost of providing different services between the United States and other countries. Moreover, we encourage parties to comment on the extent to which we can and should use AT&T's 1985 fully distributed cost analysis, with allowances made for reductions in access charges and facilities costs since 1985, as the initial basis of our cost analysis. In addition, we invite parties to provide specific information on current intra-European and intra-Asian telephone accounting rates that reportedly are approximately half prevailing standard U.S.-Europe and U.S.-Asia accounting rates. And we invite parties to comment on the extent to which we may rely on these existing intra-continental accounting rates to take regulatory action to provide for lower, and more cost-based, U.S. inter-continental accounting rate arrangements. Futhermore, we recognize that there is important ongoing work in a variety of CCITT Study Groups, including Study Group III - Tariff and Accounting Principles,[47] and we invite parties to comment whether we should recommend that U.S. delegations to the CCITT seek revision of any language in any existing, or proposed, CCITT Recommendations in order to clarify that international accounting rates should be cost-based and that all countries should exercise their best efforts to minimize the national cost of providing international telecommunications services.

17. We also recognize that the revision of CCITT Recommendation D.1 to permit unlimited resale and shared use[48] of leased lines internationally would result in the immediate benefits of lower, and more cost-based, accounting and collection rates for international telecommunications services. Nevertheless, we also recognize that while the United States has made clear its interest in permitting international resale and shared use,[49] other countries have preferred to implement the restrictions on resale and shared use that are currently permitted, albeit not required, by CCITT Recommendation D.1. Furthermore, while we strongly support the recent U.S. contribution to CCITT Study Group III that provides, *inter alia*, that international private leased circuits should be offered to all customers on the basis of the cost of providing such services, available on a flat-rate basis, and subject to customers deriving channels according to their requirements, including any customer interconnection requirement,[50] we recognize that a number of countries may prefer to retain national restrictions in order to preserve the present above-cost international accounting rate structure. As a result, while we are encouraged by movement towards permitting two-way resale and shared use represented, for example, by the recent CRTC decision[51] and we tentatively conclude that the concerns raised by AT&T vis-a-vis Canada may be best resolved by an expeditious reduction in the U.S.-Canada IMTS accounting rate,[52] we tentatively conclude that the continuing prohibition of resale between the United States and overseas markets serves as a barrier to the implementation of lower, more cost-based, international accounting rates.

18. Indeed, we are concerned that the continuation of existing resale restrictions by overseas foreign administrations permits them to ignore relevant cost trends that would otherwise result in lower, more cost-based international accounting rates[53] and international calling prices. We are even more concerned that there may be countries that seek unilaterally to alter existing accounting rate arrangements by permitting one-way resale in order to evade the requirements of the ISP.[54] As a result, should other countries unilaterally attempt to alter the IMTS accounting rate by permitting one-way resale to evade the ISP or continue to ignore international cost trends that require lower, more cost-based, international accounting rates and calling prices,[55] we are prepared to take appropriate regulatory action.

19. We believe the Communications Act provides us with broad authority to regulate international telecommunications services, including international accounting rates. Section 201(a) provides us, for example, with authority, where necessary or desirable in the public interest, to establish, *inter alia*, through routes and charges applicable thereto and the division of such charges.[56] Similarly, Section 201(b) provides us with authority to address, *inter alia*, whether charges for interstate or foreign communication by wire or radio are just and reasonable.[57] Moreover, Section 205 provides us with the authority to determine and prescribe what is a just and reasonable charge under certain circumstances.[58] Finally, Section 214 provides us with the authority, *inter alia*, to condition our grants of certificates for the construction or operation of international facilities as the public convenience and necessity may require.[59]

20. As a result, we tenatively conclude that we have the authority to establish international accounting rates, to determine and prescribe just and reasonable accounting rates, and, if necessary, condition Section 214 grants on the implementation of lower, more cost-based accounting rates. We also tentatively conclude that we would be most likely to exercise this authority only in situations in which: (1) a foreign government or telecommunications administration permits one-way resale and thereby evades the ISP; (2) a foreign government or telecommunications administration maintains an accounting rate that ignores relevant cost trends; or (3) a foreign government or telecommunications administration maintains a large assymetry in international calling prices with the United States.[60] We invite parties to comment on these tentative conclusions, and the legal and policy issues associated with the Commission exercising its authority in this area. In particular, we seek the views of the executive branch on any potential foreign policy, trade, commercial, or other implications of such proposed regulatory actions and the most appropriate mechanism or mechanisms to ensure that all the views of executive branch agencies have been considered. We also invite parties to comment on the implications of our proposed approach on the facilities review process, including whether common carrier use of any or all cable facilities should be subject to conditions, such as reductions in international accounting rates and international calling prices, similar to that used by the Commission in its review of TAT-5.[61]

IV. REGULATORY FLEXIBILITY ACT AND PAPERWORK REDUCTION ACT

21. We tentatively conclude that, in order to comply with the Commission's statutory mandate, a re-examination of the Commission's existing regulation of international accounting and collection rates is necessary to promote lower, more cost-based, international accounting and collection rates. Moreover, we tentatively conclude that we should adopt the same types of objectives that we have used in the past to examine repricing issues to guide our efforts, such as: (1) universal service; (2) the prevention of uneconomic bypass; (3) the encouragement of network efficiency; and (4) the elimination of unjust discrimination or unlawful preferential rates. Furthermore, we tentatively conclude that the legal basis for this Rule Making proceeding is contained in Sections 1, 4, 201, 202, 203, 204, 205, 211, 214, 215, 218, 220 and 303 of the Communications Act, as amended.

22. Similarly, we tentatively conclude that the actions we have proposed will facilitate the entry of additional carriers into the international telecommunications marketplace, including small entities. We recognize that the proposals suggested include the possibility of certain new reporting requirements and, therefore, implementation of any such requirements may be subject to review by the Office of Management and Budget (0MB). Copies of this notice will be sent to OMB and the Chief Counsel for Advocacy of the Small Business Administration. We believe that the proposals set forth in this notice, such as our proposal to move to a notification procedure and more definitive waiver criteria, are consistent with the objectives discussed herein and should not overlap, duplicate or conflict with any existing Federal rules. Moreover, in light of the positive marketplace effects that we believe will result from our proposals, not only will the notification and waiver proposals minimize any negative impact our proposed regulatory actions may have on any small entities, but the successful implementation of our proposed approach should permit small U.S. entities greater flexibility in the international marketplace.

V. EX PARTE REQUIREMENTS

23. For the purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules, 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* Section 1.1202(f) of the Commission's Rules, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203 of the Commission's Rules, 47 C.F.R. § 1.1203.

24. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of the Commission's Rules, 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of the same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

25. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other

previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* Section 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206.

26. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, we may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provide that the fact of this Commission's reliance on such information is noted in the Order.

VI. ORDERING CLAUSES

27. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN of the proposed regulatory action described above, and that COMMENT IS SOUGHT on these proposals.[62]

28. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before October 12, 1990, and reply comments SHALL BE FILED with the Secretary on or before November 13, 1990. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Parties should also file one copy of any documents filed in this docket with the Commission's copy contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In 1988, the Common Carrier Bureau issued a report that traced and analyzed the development of this deficit and its relationship to existing international accounting rates for telecommunications services. The Bureau Report concluded that: (1) the U.S. deficit is large and continues to grow; (2) the costs of international telecommunications facilities have declined dramatically; (3) while there have been a series of reductions in U.S. prices for international telephone service, these price reductions have not been matched by reductions in foreign prices for service to the United States; (4) international accounting rates have not kept pace with either these cost or price reductions; and (5) an analysis of these facts suggests that perhaps half of the U.S. settlements deficit could represent a subsidy to foreign telecommunications administrations. *See* "International Accounting Rates and the Balance of Payments Deficit in Telecommunications Services," Report of the Common Carrier Bureau to the FCC (December 12, 1988) (hereinafter *Bureau Report).*

[2] Moreover, for the purposes of this proceeding, we propose to use AT&T's 1985 fully distributed cost-analysis referenced in the Bureau Report as the initial basis for our cost analysis. *Id. See also* K. Stanley, "The Balance of Payments Deficit in International Telecommunications Services," Industry Analysis Division, Common Carrier Bureau, Appendix K (December 12, 1988).

[3] *See* Mackay Radio and Telegraph Company, Inc., 2 FCC 592 (1936); *aff'd by the Commission en banc*, 4 FCC 150 (1937); *aff'd sub nom.* Mackay Radio and Telegraph Co. v. F.C.C., 97 F.2d 641 (D.C. Cir. 1938).

[4] *See* TRT Telecommunications Corp., 46 FCC 2d 1042 (1974).

[5] Uniform Settlement Rates on Parallel International Communications Routes, 84 FCC 2d 121 (1980) (hereinafter *Uniform Settlements).*

[6] *See* Implementation and Scope of Uniform Settlements Policy for Parallel International Communications Routes, Report and Order, CC Docket No. 85-204, 51 Fed. Reg. 4736 (February 7, 1986), *Order on Reconsideration*, 2 FCC Rcd 1118 (1987), *Further Reconsideration*, 3 FCC Rcd 1614 (1988).

[7] The Commission concluded that its policy requires carriers providing the same service to the same foreign point to have uniform accounting rates (rate per minute of service that is negotiated and shared by initiating and terminating telecommunications administrations), settlement rates (the currency conversion stipulated in the operating agreement, which is usually Gold Francs (GFs), Special Drawing Rights (SDRs), or U.S. dollars), and division of tolls (the percentage of the accounting rate to be given each administration, which is usually 50-50) with a given PTT. The Commission stated, however, that it would consider waiver requests concerning the uniformity requirement on a case-by-case basis using a variety of factors, including the possibility of lower collection rates, improved services, and increased competition. *See Uniform Settlements, supra* note 5.

[8] The Commission coined the term "whipsawing" in *Mackay* stating that:

> To expect the telegraph administration to play the competing companies against each other is simply to expect that the administration will be headed by good businessmen, loyal to their national interests. To rely upon companies which are bitter competitors not to make concessions to the administration which controls all outgoing radio-telegraph traffic is to provide an exceedingly tenuous basis upon which to rest the public interest.

See MacKay Radio, supra note 3 at 599.

[9] Specifically, the Commission noted that high international accounting rates may raise the cost, and consequently, the price of international telecommunications services originating and terminating in the United States. Regulatory Policies and International Telecommunications, Report and Order and Supplemental Notice of Inquiry, CC Docket 86-494, 53 Fed. Reg. 12546 (1987).

[10] *See* Regulatory Policies and International Telecommunications, *Order on Reconsideration*, CC Docket 86-494, 4 FCC Rcd 323, 338 (1988).

[11] *See* "Trends in the International Communications Industry, 1975-1988," Industry Analysis Division, Common Carrier Bureau, FCC (December 1989).

[12] We have not yet received 1989 international traffic and revenue information. Carriers are required to file this information on July 31, 1990. For the most recent data on accounting rates, *see* "Accounting Rates and the IMTS Deficit, 1985-1990," Common Carrier Bureau, FCC (June 1, 1990).

[13] AT&T filed a Petition for Expedited Declaratory Ruling in CC Docket 86-494 on February 5, 1990. The petition was placed on public notice on February 8, 1990. Comments were filed on March 5, 1990. Reply comments were filed on March 19, 1990. *See* Public Notice, DA 90-176, February 8, 1990.

[14] On February 5, 1990, AT&T filed an informal complaint against MCI and US Sprint alleging that these companies are already providing this "IMTS option" with Canada under settlement arrangements different from the filed, uniform IMTS accounting rate arrangement in violation of the ISP. AT&T requests that these companies be required to justify the non-uniform arrangement under the ISP and that the Commission should direct MCI and Sprint to discontinue the provision of IMTS in this manner and require that they file tariff revisions establishing rates for terminating calls from Canada to the United States that are no less than one-half of the existing IMTS accounting rate. *See* Letter from David J. Ritchie, AT&T, to Kathie A. Kneff, Chief, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau (February 5, 1990).

In its petition, however, AT&T asserts that other U.S. carriers are becoming involved in variations of this new arrangement and alleges that NTS, a U.S. interexchange carrier, has made similar proposals to a number of foreign carriers in South America, Asia and Australia.

[15] ACC Long Distance, ADAPSO, Allnet, Burlington Telephone, Call-Net Telecommunications, CNCP Telecommunications, MCI, NTS Communications, and US Sprint oppose AT&T's request vis-a-vis Canada, and assert that any concerns with regard to Canada have been mooted by a Canadian Radio-Television and Telecommunications Commission (CRTC) decision that was released March 1, 1990. The CRTC decision relaxes Canadian rules governing the resale and sharing of private network services used to provide inter-city voice services, including traffic originating in the United States. The new rules took effect May 29, 1990. *See* Resale and Sharing of Private Line Services, Telecom Decision CRTC 90-3, Ottawa, 1 March 1990.

Moreover, these parties assert that a Commission order subjecting existing FX (traditional FX service involves a private line that is connected with the public switched network at one end) and other existing U.S.-Canada cross-border arrangements to the uniformity requirements of the ISP would be "regressive" or "protectionistic," would be contrary to longstanding U.S. domestic and international efforts to promote unlimited resale and shared use, and could adversely affect the ability of users to interconnect international private lines to the domestic public switched network. Finally, MCI notes that to the extent that there is any truth to AT&T's claim that third parties are encouraging overseas administrations to divert IMTS from the public switched network to private lines, MCI, although it has not seen any evidence of this occurring, would share AT&T's concern.

[16] TRT's petition claims that the packet switching service protocols used by TRT and Telenet result in no service differences, are transparent to the end user, and that the uniformity requirements of the ISP should apply. In an earlier complaint, TRT stated that Telenet had unlawfully introduced a $6.00 per hour and $6.00 per kilosegment accounting rate with Cable and Wireless PLC for Bermuda --that is, below a pre-existing $8.00 per hour TRT-C&W Bermuda accounting rate. Telenet responded, *interalia*, that there are technical and user differences between the protocols which render the networks to be materially different. *Citing* FTC Communications Inc., Memorandum Opinion and Order, Transmittal No. 174, Mimeo No. (released March 6, 1984); GTE Telenet Communications Corp., Memorandum Opinion and Order, Transmittal Nos. 48 and 49, Mimeo No. (released April 26, 1984).

[17] *See, e.g.*, MTS/WATS Market Structure, Report and Third Supplemental Notice of Inquiry and Proposed Rule Making, CC Docket 78-72, 81 FCC 2d 177 (1980).

[18] In 1982, for example, the Commission eliminated the regulatory dichotomy between voice and record services, allowing international record carriers to also provide voice services and IMTS providers to also provide data services. Subsequently, the Commission eliminated restrictions on Comsat's entrance into the competitive provision of international telecommunications services, granted authorizations for international communications satellite systems separate from the INTELSAT system and permitted the development of "private" cable systems. Moreover, the Commission has encouraged foreign administrations to enter into operating agreements with additional U.S. IMTS carriers. As a result, AT&T now faces facilities-based competition in 19 out of the top 20 international markets. *See, e.g.*, Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rule Making, CC Docket 90-132, FCC 90-90 (released April 13, 1990).

[19] Interstate long distance rates, which traditionally exceeded the cost of providing service, have been reduced by over 40% since 1984. *See* "FCC Releases Semi-annual Study on Telephone Trends," No. 1745 (February 14, 1990).

[20] The most important measures adopted by the Commission to promote universal service include: (1) high cost assistance; (2) long-term support to minimize pressures to deaverage interstate toll rates due to the access rate structure; and (3) lifeline assistance. Lifeline assistance includes both reductions in, or waiver of, the federal subscriber line charge and the connection of low income households to the U.S. telephone network in a program known as "Link-Up America." Information provided by the National Exchange Carrier Association (NECA) suggests that the following would be reasonable estimates of the projected 1990 cost of these assistance programs: (1) high cost assistance ($339 million); (2) long term toll support ($268 million) (3) transitional support ($311 million); (4) lifeline ($67.3 million); and (5) Link-Up ($8.8 million). *See* Federal-State Joint Board Staff Monitoring Report, CC Docket 87-339, January 1990 (hereinafter FSJB Staff Report). Moreover, recent figures demonstrate that telephone subscribership has increased by almost 9 million households since 1984 to over 87 million households in 1990. Indeed, 93% of households in the United States now have a telephone. *See* "Telephone Subscribership in the U.S." Industry Analysis Division, Common Carrier Bureau (January 1990).

[21] The Commission has issued three bypass reports resulting from a concern that prices that existed in the interstate long distances services market differed widely from the cost of providing those services and thereby provided a strong artificial incentive for bypass of the existing public switched telephone network. In 1987, for example, a Federal-State Joint Board Staff

Monitoring Report noted that the average price of an ordinary interstate long distance telephone call was about 20 cents per minute and that the true costs of providing that call are "nowhere near as high." *See* Federal-State Joint Board Staff Monitoring Report, CC Docket 87-339, September 1987, at 90. Moreover, the Commission has noted that revenue losses from uneconomic bypass activities would be recovered by charging higher rates to remaining customers -- that is, residential subscribers and small business customers -- who are unable to bypass the public switched network. *Id.*

[22] Interstate long distance service traffic volumes have grown at an annual rate of 13%, more than doubling usage of the interstate switched network since 1984.

[23] In this context, we note that the $1 billion overpayment that we estimate the United States is paying to other countries in the form of unwarranted settlements payments may exceed the assistance that the Commission has provided for nationwide high cost, lifeline, Link-Up, and long-term and transitional pooling assistance. Moreover, the settlements-based overpayment sent to certain countries appears to exceed the level of high cost support given to any single U.S. state, or, alternatively, the total federal assistance for the lifeline and Link-Up programs. Furthermore, we note that to the extent that carriers, such as Ameritech, Bell Atlantic, BellSouth and Southwestern Bell, are correct that disconnections from the network are often the result of unpaid toll charges, high international calling prices may have a direct negative impact on universal service. *See* Federal-State Joint Board Staff Monitoring Report, CC Docket No. 87-336 (June 1988) at 43-7.

[24] The average price for IMTS charged to U.S. consumers, for example, has, in recent years, been as much as six times the average price charged for domestic long distance service. In 1987, for example, the average price for IMTS service originating in the United States was approximately $1.20 per minute versus an average of approximately $0.20 per minute for domestic long distance service. This difference in calling prices persists despite the fact that, absent above-cost international accounting rates, there appears to be relatively little difference between U.S. domestic and overseas calling costs. *See Bureau Report supra* note 1 at 36-43.

[25] The weighted average accounting rate was $1.38 in 1987. In contrast, the total interstate access charge by local telephone companies to long distance carriers was 13 cents during 1987, with 7 cents remaining to cover the costs of the long distance carrier. Therefore, the originating or terminating country's share of the accounting rate ($0.69) was $0.49 above the average price of a U.S. domestic long distance call. *See* FSJB Staff Report (Sept. 1987). These figures suggest that the incentive to "bypass" the existing international public switched long distance network along the lines described by AT&T is significantly higher than the artificial incentive for domestic bypass cited by the Commission in 1983, 1985 and 1987. *Id.*

[26] In 1988, for example, we estimate that while the average price per minute for a U.S.-originated IMTS call was approximately $1.20, the average price for a foreign-originated IMTS call to the United States was $1.70.

[27] It is important to note that while the United Kingdom has traditionally been considered a "benchmark" rate for Europe, the United States-United Kingdom IMTS accounting rate has not been lowered since 1982.

[28] The U.S.-Hong Kong IMTS accounting rate is $2.35 per minute, or roughly twice either the U.S.-Australia [0.8 SDRs($1.05)] or the U.S.-Singapore [0.84 SDRs($1.10)] IMTS accounting rates.

[29] The Federal Republic of Germany (F.R.G.) has been the largest overseas recipient of U.S. settlements payments, reaching $152 million in 1988. The resulting U.S. overpayment of some $76 million appears to be largely a result of the fact that the Bundespost's calling prices to the United States have been almost double those of U.S. per minute calling prices to Germany and that the U.S.-F.R.G. accounting rate of 1.2 SDRs ($1.58), which is well above the cost of providing service, has not been modified since 1983.

[30] In 1986, for example, four IRCs filed petitions for waiver to permit reductions in the accounting rate for international direct telex service between the continental United States and the countries of the Conference Europeene des Administrations des Postes et Telegraphes (CEPT), excluding the United Kingdom and Ireland, yet this reduction did not go into effect until 1988. *See* Western Union International, Inc., *et. al.*, 3 FCC Rcd 52 (1988).

[31] In a 1988 survey of 18 countries, for example, a Bureau study concluded that only five countries (Japan - $4.22, Spain - $2.63, Greece - $2.37, Italy - $2.35, and Finland - $2.34) had higher telex calling prices per minute of use to the United States than U.S.-originated telex calls (Continental Europe - $2.25; Japan - $2.67). *See* K. Stanley, "The Balance of Payments Deficit in International Telecommunications Services," Industry Analysis Division, Common Carrier Bureau, FCC, Appendix M (December 12, 1988).

[32] In April 1988, for example, AT&T filed a petition for waiver to permit a reduction in the accounting rate for international direct packet switched service between the United States and the Deutsche Bundespost in the Federal Republic of Germany from 3.32 to 2.85 SDRs that was opposed by TRT. In January, 1989, the Bureau granted the AT&T waiver request. *See* American Telegraph and Telephone Company, 4 FCC Rcd 1195 (1989). Moreover, on reconsideration the Bureau noted that the waiver grant would create greater incentives for the introduction of U.S. collection rates for service to the FRG that more closely approximate the lower collection rates charged by the Bundespost for this kind of service to the United States. *See* American Telephone and Telegraph Company, Order on Reconsideration, File No. USP-88-W-025 (released August 29, 1989).

[33] On July 13, 1989, for example, MCI filed a petition for waiver of the ISP to permit a reduction in the accounting rate for international telex service between the United States and France to .95 SDRs. MCI's request, however, which was unopposed, was not granted under our ISP rules until September 25, 1989 -- that is, 60 days after MCI's request was placed on public notice. Moreover, FTCC and TRT, which subsequently filed similar waiver requests, were also required under ISP rules to wait sixty days after the date of their filing before the waiver requests were deemed granted.

[34] By "simple reduction," we mean a reduction that involves a mathematical reduction in the accounting rate and no other change to the operating agreement between the carriers. This would include, for example, a simple reduction from 1.2 SDRs to 0.6 SDRs, or from $1.00 to $0.50 per minute. This would not include, however, a modification of the accounting rate that would include a shift of the exchange rate risk (for example, a change from $1.00 to 0.60 SDRs) or the introduction of modified accounting rate approaches that continue to require regulatory scrutiny, such as the addition of multiple accounting rate structures (for example, peak and off-peak, or base and "growth-based" rates).

[35] We propose initially to permit this notification procedure for four types of international service: (1) IMTS; (2) telex; (3) telegraph; and (4) packet-switched data service.

[36] We propose to require that the notification procedure apply only to prospective changes in order to address the possibility that foreign telecommunications administrations might require a retroactive effective date to the disadvantage of U.S. carriers. We would permit a retroactive effective date only for additional U.S. carriers that wished to implement a lower rate already implemented by another U.S. carrier and only as far back as the initial implementation date as set forth in the initiating carrier's notification to the Commission.

[37] Moreover, we propose that carriers taking advantage of this notification option would also be required to serve a copy of this notification letter on all other carriers providing the same or similar service to and from the country specified in the notification.

[38] Under this proposed approach, for example, while the services referenced in the TRT petition would be considered like packet-switched services, Telenet would be permitted to implement a lower accounting rate simply by notifying the Commission. While we recognize that such an approach might result in a slight increase in the U.S. balance of payments deficit should we adopt the proposed approach for packet-switched data and telex services, we tentatively conclude that we should allow such reductions should it be shown in this proceeding that the cost of providing international packet-switched data and telex services is below current international accounting rates for these services. We invite parties to comment on this tentative conclusion, the interrelationship, if any, of any modification of our treatment of packet-switched data and telex services on IMTS and the potential impact of the proposed changes for these services on the balance of payments deficit.

[39] Under existing ISP rules, telex, telegraph and packet switched data services are subject to 60-day waiver procedure and IMTS is subject to a 21-day waiver procedure. Under our proposed approach, any proposed modification to an accounting or settlement arrangement not covered by the notification option would be subject to the 21-day review procedure currently applied for IMTS service.

[40] This might involve, for example, modifying a settlement agreement with a foreign administration to settle in the future in SDRs rather than GFs.

[41] Under the proposed waiver approach, carriers would also be required to submit sworn statements that they have entered into non-exclusive arrangements and that their foreign correspondents have committed to send them only a proportionate share of return traffic. *See* para. 13 *supra*.

[42] We note, for example, that a proposal for a .35 SDR per minute surcharge for country direct service with Spain is inconsistent with recent work in CCITT Study Group III Working Party III/4, which recommended that the accounting rate for country direct service be that of international automatic telephone service. *See* Temporary Document No. 4013, Working Party III/4, Geneva, 19-21 February 1990. The proposed surcharge itself is more than twice the average U.S. domestic long distance calling price per minute. Indeed, the proposed $850,000 retroactive payment by AT&T for ten dedicated telephones in Spain would, by way of comparison, exceed the entire high cost fund amount that NECA has estimated will be paid to Puerto Rico in 1990 ($617,571). *See* Jan. 1990 FSJB Staff Report, *supra* note 20. On July 12, 1990, the Chief, Common Carrier Bureau denied the proposed .35 SDR per minute surcharge and the retroactive payment. *See* AT&T and MCI, File Nos. USP-89-(N)-086, USP-89-(N)-092 (Com. Car. Bur. adopted July 12, 1990).

[43] Under this proposed approach, this would also preclude, for example, a U.S. carrier paying out more than a 50 percent share of the accounting rate for transit arrangements.

[44] The ITU, founded in 1865 as the International Telegraph Union, is the world's oldest continuing, international, intergovernmental organization. Traditionally, the ITU, which became "recognized" at the 1947 Atlantic City Conference as the United Nations specialized agency responsible for international telecommunications matters, has convened a plenipotentiary conference every five to six years. On June 30, 1989, the Plenipotentiary Conference of the ITU at Nice, France, adopted amendments that provide, *inter alia*, for a new Constitution and Convention for the ITU.

[45] Article 6.1.1. states that:

> Each administration (or recognized private operating agency) shall, subject to applicable national law, establish the charges to be collected from its customers. The level of charges is a national matter; however, in establishing these charges, administrations (or recognized private operating agencies) should try to avoid too great a dissymetry between the charges applicable in each direction of the same relation.

See The International Telecommunications Regulations, Final Acts of the World Administrative Telegraph and Telephone Conference, Melbourne, Australia (November 28 to December 9, 1988).

[46] Article 6.2.1 states that:

> For each applicable service in a given relation, administrations (or recognized private operating agencies) shall by mutual agreement establish and revise accounting rates to be applied between them, in accordance with the provisions of Appendix 1 and taking into account relevant CCITT Recommendations and relevant cost trends.

Article 6.2.1. *Id.*

[47] The IXth CCITT Plenary Assembly entrusted Study Group III (Tariff and Accounting Principles) with thirty-one proposed questions for study during the 1989-1992 period, including, *inter alia*: general principles for the lease of international private telecommunications circuits; charging and accounting principles in the international telephone service; tariff principles for international telex service; and tariff and accounting arrangements for public data communications services on public packet-switched networks. *See, e.g.*, Study Group III, Contribution 1, "Questions Assigned to Study Group III (Tariff and Accounting Principles) for Study During the 1989-1992 Period," CCITT, (January 1989).

[48] In 1976, the Commission concluded that the unlimited resale and sharing of domestic private line service would bring about public benefits that include, *inter alia*, the provision of communications services at rates more closely related to costs. The Commission also found that, in light of the standards set forth in Section 201(b) and 202(a) of the Act, and legal interpretations thereof, then existing restrictions on the resale and sharing of private lines were unjust and unreasonable and unlawfully discriminatory. *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order, Docket 20097, 60 FCC 2d 261 (1976).

[49] In 1980, for example, the Commission adopted a notice of proposed Rule Making to consider whether or to what extent common carriers subject to our jurisdiction should be allowed to continue to restrict the resale and shared use of the services and facilities they offer under tariff. *See* Regulatory Policies Concerning Resale and Shared Use of Common Carrier International Communications Services, Notice of Proposed Rule Mak-

ing, CC Docket 80-176, 77 FCC 2d 831 (1980). While we recognize that the record in the international resale proceeding is dated, we invite parties to comment on any remaining U.S. carrier restrictions on resale and the desirability of closing that docket and addressing any remaining legal and policy implications, including the possible elimination of any remaining carrier restrictions against the resale and shared use of international telecommunications services and facilities, in this proceeding.

[50] *See* U.S. Proposal for a New Recommendation D.1, Contribution 27, Study Group III (October 1989).

[51] *See supra* note 15.

[52] We encourage carriers to negotiate lower, more cost-based accounting rates with their Canadian correspondent(s) and file petitions for waiver with the Commission as soon as possible. Moreover, in light of the fact that there is no evidence as yet of private line resale of IMTS service occuring with an overseas administration, we tentatively conclude that we should hold AT&T's petition in abeyance pending review of comments submitted in this proceeding. Furthermore, we believe it is appropriate for the Bureau to hold AT&T's complaint against MCI and US Sprint in abeyance as well pending what we expect to be an expeditious implementation of a lower, more cost-based, U.S.-Canada IMTS accounting rate.

[53] We are particularly concerned by statements, such as one recently made by I. Vallance, Chairman, British Telecom, that private carriers may not be able to reduce international accounting rates on their own in light of the fact that "these rates are largely determined by national governments, not by independent operators." *See* Telephone Rates and the U.K. Review, Letter from I. Vallance, Financial Times, April 4, 1990.

[54] As a result, we propose to require that carriers that initiate a resale arrangement with a foreign administration that would permit interconnection of a private line with the U.S. public switched telephone network provide us with a written copy of that arrangement, including the domestic interconnection arrangements, prior to the actual initiation of such service. Moreover, we propose to initiate immediate regulatory action upon notice of the initiation of any one-way resale arrangements. *See* discussion *infra* para. 19.

[55] Indeed, we are concerned that such actions may threaten the ability of the United States to attain the purposes of the International Telecommunication Union, which include, *inter alia*, "promoting the development of telecommunications services" and the "efficiency, usefulness and availability to the public of international telecommunications services." *See* International Telecommunications Regulations, *supra* note 45, at Preamble and Article 1.

[56] *See* 47 U.S.C. § 201(a).

[57] In this context, we note that AT&T, for example, has argued that a competing carrier's tariff may be unlawful when it is based on an "unlawfully high accounting rate." *See* AT&T Petition to Reject or Suspend, MCI Telecommunications Corp., Memorandum Opinion and Order, Transmittal No. 543, DA 98-1040, (released August 28, 1989). In addition, TRT supports AT&T's position that the offering by U.S. carriers of one-way resale interconnection arrangements should be considered an unreasonable practice in violation of Section 201(b) of the Act. *See supra* para. 5.

[58] *See* 47 U.S.C. § 205.

[59] *See* 47 U.S.C. § 214.

[60] We have listed, in Appendix A to the Notice, the countries with which the United States has the largest international settlements-based balance of payments deficit for the years 1985-88 and the gross national product (GNP) per capita for each country. In Appendix B, we have listed the countries with the largest IMTS deficits in 1988 and current IMTS accounting rates with these countries. Information on countries that are not listed are available in the more lengthy reports listed in Appendices A and B. In Appendix C, we have included information on foreign calling prices to the United States, including those countries that have unreasonably high calling prices to the United States. We invite parties to provide any additional information on these or other relevant issues and to comment on setting priorities for any exercise of our regulatory authority in this area by focusing our efforts on one or more countries with a relatively high GNP per capita, that also have a high accounting rate, a large international settlements-based balance of payments surplus, or unreasonably high calling prices.

[61] In 1968, for example, the Commission made clear that it would be appropriate for the applicants that wished to construct TAT-5 to file an application subject to the condition, *inter alia*, that IMTS rates would be reduced by at least 25 percent by the opening of the cable for service. *See* AT&T, ITT, RCA, and WUI, Memorandum Opinion, Order, and Authorization, 13 FCC 2d 235 (1968).

[62] This action is taken pursuant to Sections 1, 4, 201-205, 211, 214, 215, 218, 220 and 303(r) of the Communications Act as amended, 47 U.S.C. §§ 151, 154, 201-205, 211, 214, 215, 218 and 303(r).

APPENDIX A

GNP per Capita and the Largest IMTS Deficits

Country	GNP per Capita 1/	IMTS Deficit 1985-1988 2/	Percent of Total Deficit
Mexico	$1,059	$1,201,648,901	19.3%
Federal Republic of Germany	$19,471	$422,257,540	6.8%
Korea, Republic of	$2,961	$340,202,406	5.5%
Philippines, Republic of	$658	$322,215,025	5.2%
Japan	$23,668	$285,165,637	4.6%
Colombia	$1,101	$206,031,812	3.3%
Italy	$14,523	$181,950,587	2.9%
Dominican Republic	$706	$178,655,437	2.9%
Israel	$7,467	$175,705,092	2.8%
Taiwan	$7,509	$148,211,817	2.4%
United Kingdom	$14,552	$126,908,467	2.0%
Brazil	$1,120	$114,610,013	1.8%
France	$16,704	$102,129,256	1.6%
El Salvador	$910	$99,589,466	1.6%
Peru	$557	$97,114,289	1.6%
Poland	$1,426	$94,992,088	1.5%
Greece	$5,029	$92,948,077	1.5%
Pakistan	$365	$92,022,964	1.5%
Thailand	$892	$87,531,239	1.4%
Ecuador	$763	$85,633,788	1.4%
Jamaica	$1,046	$85,057,739	1.4%
Haiti	$355	$80,992,461	1.3%
Spain	$7,654	$71,062,142	1.1%
Egypt	$1,284	$65,919,229	1.1%
Guatemala	$748	$64,394,255	1.0%
Hong Kong	$6,545	$62,869,773	1.0%
Argentina	$1,905	$50,634,507	0.8%
Yugoslavia	$2,358	$50,062,572	0.8%
Indonesia	$386	$49,819,302	0.8%
Trinidad & Tobago	$3,773	$49,320,557	0.8%
Subtotal: Top 30 IMTS Deficit		$5,085,656,438	81.6%
Total IMTS Deficit 1985-1988		$6,233,247,536	----

1. "International Financial Statistics," International Monetary Fund, August, 1989. GNP per capita of the United States was $19,747 in 1988.
2. "International Communications Service Data, 1985-1988: A Summary," Industry Analysis Division, Common Carrier Bureau, Federal Communications Comission.

APPENDIX B

Largest IMTS Deficits and Accounting Rates

Country	IMTS Deficit in 1988 1/	Accounting Rate in 1990 2/
Mexico	$410,865,000	Not Applicable
Federal Republic of Germany	$153,146,903	1.2 SDR ($1.58)
Korea, Republic of	$106,244,713	$2.10
Philippines, Republic of	$94,788,706	$1.92/1.50
Japan	$91,431,395	1.34 SDR ($1.76)
Colombia	$63,260,983	$1.85
Dominican Republic	$61,941,154	$1.42/0.80
Italy	$59,625,919	4.6/3.67 GF ($1.97/1.58)
Israel	$47,468,959	$2.40/2.10/1.90
United Kingdom	$44,480,156	$1.06/0.76
Taiwan	$43,899,307	$1.80
Brazil	$36,749,216	$2.50/1.20
El Salvador	$33,032,418	$1.50
Poland	$32,161,339	$1.50
Pakistan	$31,935,846	$2.30
France	$31,379,127	1.2/1.0 SDR ($1.58/1.31)
Jamaica	$30,321,293	$1.75/0.74
Peru	$29,855,042	$2.00/1.20
Greece	$28,458,950	5.0 GF ($2.15)
Ecuador	$27,434,802	$1.70
Thailand	$25,928,781	$2.30
Spain	$24,184,136	1.6/1.2 SDR ($2.10/1.57)
Guatemala	$22,888,359	$1.50
Haiti	$22,764,141	$1.45
Trinidad & Tobago	$19,199,553	$1.65
China, People's Republic	$19,124,002	8.0 GF ($3.43)
Egypt	$18,154,887	$1.90
Iran	$17,225,944	$3.00
Argentina	$15,408,865	$1.65
Ireland	$14,636,060	$1.50/1.25

1. "International Traffic Data Report, 1988," Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, October 11, 1989.
2. "Accounting Rates and the IMTS Deficit, 1985-1990," Industry Analysis Division, Common Carrier Bureau, Federal Communications Comission, June 5, 1990.

APPENDIX C

IMTS Dial Service Rates

AT&T RATES

Country	Initial Period			Additional Minute		
	Standard	Discount	Economy	Standard	Discount	Economy
Mexico 1/ 2/	$1.77	----	$1.19	$1.41	----	$0.95
Fed. Rep. of Germany	$1.77	$1.42	$1.15	$1.09	$0.82	$0.65
Korea, Republic of	$3.68	$2.80	$2.38	$1.37	$1.04	$0.89
Philippines	$3.25	$2.75	$2.30	$1.40	$1.10	$0.85
Japan	$3.05	$2.55	$2.16	$1.24	$0.99	$0.81
Colombia	$2.39	$1.91	$1.55	$1.11	$0.84	$0.67
Dominican Republic	$1.45	$1.16	$0.94	$1.06	$0.80	$0.64
Italy	$1.88	$1.40	$1.16	$1.04	$0.77	$0.65
Israel	$2.98	$2.47	$2.08	$1.20	$0.90	$0.75
United Kingdom	$1.44	$1.15	$0.98	$0.94	$0.71	$0.60
Taiwan	$3.55	$2.84	$2.37	$1.44	$1.09	$0.89
Brazil	$2.50	$1.89	$1.56	$1.04	$0.79	$0.67
El Salvador 3/	$2.25	$1.80	$1.46	$1.06	$0.80	$0.64
Poland 4/	$2.23	$1.60	$1.45	$1.25	$0.90	$0.81
Pakistan	$4.45	----	$2.94	$2.04	----	$1.22
France	$1.71	$1.39	$1.15	$1.06	$0.80	$0.65
Jamaica 3/ 4/	$1.48	$1.10	$0.89	$0.99	$0.75	$0.60
Peru	$2.39	$1.91	$1.55	$1.11	$0.84	$0.67
Greece	$2.17	$1.63	$1.30	$1.22	$0.92	$0.73
Ecuador 3/	$2.39	$1.91	$1.55	$1.11	$0.84	$0.67
Thailand	$3.96	$2.98	$2.38	$1.48	$1.12	$0.89
Spain	$1.94	$1.46	$1.16	$1.09	$0.82	$0.65
Guatemala 3/	$2.25	$1.80	$1.46	$1.06	$0.80	$0.64
Haiti 3/	$1.58	$1.18	$0.95	$1.06	$0.80	$0.64
Trinidad & Tobago 3/	$1.58	$1.18	$0.95	$1.06	$0.80	$0.64
China 4/	$5.58	$4.18	$3.35	$1.48	$1.12	$0.89
Egypt	$2.71	$2.04	$1.62	$1.39	$1.04	$0.84
Iran	$3.46	$2.59	$2.08	$1.25	$0.94	$0.75
Argentina	$2.39	$1.91	$1.55	$1.11	$0.84	$0.67
Ireland	$1.63	$1.32	$1.12	$1.04	$0.80	$0.69

APPENDIX C
(continued)

FOREIGN ADMINISTRATION RATES

Country	Initial Period			Additional Minute		
	Standard	Discount	Economy	Standard	Discount	Economy
Mexico 1/ 2/	$1.56	----	$0.88	$1.20	----	$0.64
Fed. Rep. of Germany	$1.60	----	----	$1.60	----	----
Korea, Republic of	$2.94	---	----	$2.94	----	----
Philippines	$3.30	$2.45	----	$2.45	$1.80	----
Japan	$2.57	$2.08	$1.53	$1.25	$0.97	$0.76
Colombia	$2.33	$1.08	----	$2.33	$1.08	----
Dominican Republic	$2.45	$2.02	----	$2.45	$2.02	----
Italy	$2.87	$2.16	----	$2.87	$2.16	----
Israel	$2.56	$1.92	$1.30	$2.56	$1.92	$1.30
United Kingdom	$1.04	$0.94	$0.79	$1.04	$0.94	$0.79
Taiwan	$3.69	$3.32	$2.58	$2.40	$1.85	$1.29
Brazil	$3.78	$2.53	----	$3.78	$2.53	----
El Salvador 3/	$1.20	$0.96	----	$1.20	$0.96	----
Poland 4/	$6.51	----	----	$2.17	----	----
Pakistan	$2.88	----	----	$2.88	----	----
France	$1.19	$0.90	----	$1.19	$0.90	----
Jamaica 3/ 4/	$3.89	$3.26	----	$1.30	$1.09	----
Peru	$3.48	$2.82	----	$3.48	$2.82	----
Greece	$2.57	----	----	$2.57	----	----
Ecuador 3/	$2.40	$2.00	----	$1.12	$0.93	----
Thailand	$2.79	----	----	$2.39	----	----
Spain	$3.03	$2.06	----	$3.03	$2.06	----
Guatemala 3/	$2.00	$1.65	----	$2.00	$1.65	----
Haiti 3/	$6.00	----	----	$2.00	----	----
Trinidad & Tobago 3/	$1.41	----	----	$1.41	----	----
China 4/	$8.79	----	----	$2.93	----	----
Egypt	$3.85	$2.97	----	$3.85	$2.97	----
Iran	$2.88	----	----	$2.88	----	----
Argentina	$2.72	$2.18	----	$2.72	$2.18	----
Ireland	$1.50	$1.13	----	$1.50	$1.13	----

Sources: "AT&T Tariff F.C.C. No. 1," "World Telecommunications Tariff Directory," International Telephone, Lynx Technologies, Inc., 1989, and Kenneth B. Stanley, "The Balance of Payments in International Telecommunications Services," Federal Communications Commission, December 12, 1988.

APPENDIX C
(continued)

Notes to Appendix C

1. Rates vary with mileage in Mexico and the United States. The rates shown are for service between New York City and Mexico City.
2. Rates for service from Mexico do not include a government tax, which is currently 40 percent.
3. Rates from the country for service to the United States vary by state in the U.S. The rates shown are for service to New York.
4. Rates for service from this country are operator station rates in the absence of direct dial service.

Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 90-276

In the Matter of	)	
	)	
Competition, Rate Deregulation and the	)	
Commission's Policies Relating to the	)	MM Docket No. 89-600
Provision of Cable Television Service	)	

REPORT

Adopted: July 26, 1990 ; Released: July 31, 1990

By the Commission: Commissioners Sikes, Chairman, Quello and Barrett issuing separate statements.

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I. INTRODUCTION

1. This Report has been prepared and is being submitted to the Congress pursuant to the requirements of the Cable Communications Policy Act of 1984 ("Cable Act").[1] Congress enacted the Cable Act to establish a franchise process that would encourage the growth and development of cable systems and to encourage cable systems to provide the widest possible diversity of information sources and services to the public.[2] The Cable Act was designed

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1 Pub. L. No. 98-549, 98 Stat. 2780, codified in Title VI of the Communications Act of 1934, 47 U.S.C. §§ 521 et seq.

2 Section 601 of the Cable Act states:

The purposes of this title are to -- (1) establish a national

to promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.[3] To assist in a review of marketplace developments in the six years following enactment of the Cable Act, Congress gave the Federal Communications Commission ("FCC" or "Commission") a mandate to prepare a report and make appropriate recommendations regarding cable rate regulation, based on a study of the effect of competition in the marketplace.[4]

2. Responding to that statutory mandate, this Report finds that the six years since enactment of the Cable Act -- and particularly the three and one-half years since widespread rate deregulation began thereunder -- have witnessed a significant and ongoing transformation of the video marketplace.

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policy concerning cable communications; (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community; (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems; (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public; (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance meets the standards established by this title; and (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 521.

3 Id.

4 Section 623(h) of the Cable Act states:

> Not later than 6 years after the date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace.

47 U.S.C. § 543(h).

The Cable Act sought cable industry growth, and the number of communities and homes served by cable has increased significantly. The Cable Act sought cable industry development, and cable has further developed its multichannel services beyond retransmission, changing the expectations of most Americans about television viewing options. The Cable Act also sought competition to cable operators, however, and the competition within the video industry is just beginning to expand and include alternative multichannel providers. Thus, the cable industry, and the newer alternative multichannel video providers beginning to compete with cable, are still evolving.

3. The growth and development that the cable industry has experienced since the Cable Act are readily measurable. First, the cable industry has invested in expanding its plant to the point where it now offers multichannel video service to about 90 percent of Americans; before the Cable Act, cable was available to about 70 percent of American households.[5] Second, the cable industry has significantly expanded its channel capacity -- now offering substantially greater viewing choices to the American public. While almost 60 percent of all cable subscribers were served by cable systems with at least 30 channels before the Cable Act, that number has grown to about 90 percent of cable subscribers today.[6] The cable industry has significantly increased its annual investment in new and expanded capacity by 55 percent, from $1.1 billion in 1984 to $1.7 billion in 1989.[7] Third, the cable industry has launched numerous new programming services and original programs. Indeed, the number of cable programming services has doubled since the Cable Act.[8] The cable industry has tripled annual spending on programming from $302 million to $965 million during this same period.[9] Fourth, we note that cable industry revenue has more than doubled from $8.5 billion in 1984 to $17.7

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5 These figures represent the fraction of American households passed by cable in 1989 and 1984, respectively. The total households figures are from 58 Television & Cable Factbook, Cable & Services at C-340 (1990 ed.) and 53 Television & Cable Factbook, Cable & Services at 39 (1985 ed.). The homes passed figures are from Paul Kagan Associates, Inc., Marketing New Media, at 5 (June 18, 1990).

6 The figures are for 1984 and 1990, respectively. See 58 Television & Cable Factbook, Cable & Services at C-385 (1990 ed.) and 52 Television & Cable Factbook, Cable & Services at 1726 (1984 ed.).

7 National Cable Television Association ("NCTA"), Cable Television Developments at 6 (May 1990).

8 The increase is from 67 to 181. See infra para. 43. The primary growth areas have been regional sports and other niche services.

9 See infra para. 44.

billion in 1989; the portion of cable's revenues derived from advertising has more than tripled from $594 million to over $2 billion.[10]

4. The American public has clearly welcomed the wider viewing options that the cable industry has provided. The number of cable subscribers has grown from 37 million in 1984 to 53 million in 1989; however, penetration of homes passed has remained between 61-63 percent during this period.[11] Overall audience ratings for basic cable programming services have doubled since 1984, now exceeding, on average, the total all-day audience share of any major television network affiliate.[12]

5. Congress intended to free cable operators from the constraints of unnecessary local rate regulation, subject to an appropriate definition of "effective competition" to be adopted by the Commission.[13] The Cable Act was designed, inter alia, to allow the substantial investments necessary for expanded system capacity and new programming -- and these have occurred.[14]

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10 NCTA, Cable Television Developments at 12-13 (citing estimates of Paul Kagan Associates, Inc.). In addition to expenses for system investments and programming, cable systems have significant expenses for operation, maintenance, depreciation and local franchise fees, the last of which in 1989 amounted to $767 million. Comments of NCTA at 35.

11 The cable subscribership data are from NCTA, Cable Television Developments at 2 (citing Nielsen estimates). The homes passed data are from Paul Kagan Associates, Inc., Marketing New Media at 5 (June 18, 1990).

12 For the period from January to April 1990, the composite basic cable average 24 hour rating in all television households was 6.0. For affiliates of the three major commercial networks, the comparable figures were 5.6, 5.5 and 5.5. For independent broadcast stations taken together, the rating was 5.9. See Cabletelevision Advertising Bureau, "Advertiser Alert: Average Ratings Delivery in Total TV Households: 24 Hours" (undated).

13 Section 601(6) states that the Cable Act was intended to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." Furthermore, the report accompanying the Cable Act of 1984 states: "The Committee believes that the availability of competing sources of programming in a given market will keep the rates for basic services reasonable in that market without the need for regulation." See Cable Franchise Policy and Communications Act of 1984, H.R. Rep. No. 9431, 98th Cong., 2d Sess. 25 (1984) ("House Report").

14 Section 601(4) states that the Cable Act was intended to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and service to the public." 47 U.S.C. § 521.

Despite the substantial investment in expanded capacity and programming made possible by deregulation under the Cable Act, however, many cable subscribers have complained about the significant cable rate increases which have accompanied this expanded service. Deregulated rates for the lowest price tier of cable service have risen faster than the general rate of inflation,[15] although the percentage of annual rate increases has begun to decline (to about eight and one-half percent in 1988 and 1989) since their initial 15.5 percent jump in 1987.[16] Furthermore, increases in the average subscriber's total monthly bill (including premium services and equipment) have also slowed to only slightly above the general rate of inflation, with the average subscriber's bill rising 5.4 percent in 1989 (after roughly seven percent increases in 1987 and 1988).[17] The data collected on rate increases are inconclusive on the issue of market power, however, in the absence of information about costs.

6. Notwithstanding the fact that rate adjustments may have been an anticipated consequence of deregulation, a number of subscribers and municipalities have expressed alarm about especially sharp rate hikes. Sometimes these increases have amounted to more than a doubling of basic rates in a relatively short period.[18] Coupled with rising frustration over the poor quality of technical and customer service some subscribers have received from their local cable operators, such rate increases have fueled broader concerns that cable operators exercise market power.[19]

7. In addition to these complaints about rates and service since the Cable Act, existing or emerging competitors to cable allege anticompetitive developments and conduct in the cable industry. These charges have focused on the increasing concentration of ownership in the cable industry and on cable industry relationships with program providers, with developing competitors

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15 While inflation totaled 12.5 percent for the three-year period from 1987 through 1989, monthly rates for the lowest priced tier rose a total of 36 percent during that period.

16 General Accounting Office, Telecommunications: Follow-up National Survey of Cable Television Rates and Services, Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives (June 1990) ("1990 FCC-GAO survey").

17 Id.

18 For examples of substantial increases in monthly basic rates, see infra para. 29.

19 "Market power" is the ability to restrict output or raise price over what would prevail in a competitive market, and maintain it over time.

and with the broadcast industry. Our undertaking of this Report thus coincides with a growing sense, among various interested parties, subscribers and their legislators, that the time is ripe to review both the progress of the cable industry and the legal framework under which it operates.

8. The goal of this Report is to provide Congress with information on the state of the cable television industry and to recommend ways to ensure diversity and consumer choice in a changing local video marketplace. As the Report reveals, this Commission steadfastly believes that robust competition will more efficiently provide both a better safeguard against undue rate increases or service failings and a greater diversity and choice than any web of rules and regulations designed to mimic competition or otherwise compensate for its absence. Where such competition flourishes, government should avoid interceding. Where such competition has yet to thrive, government should tread lightly -- seeking to encourage fledgling competitors only so much as to overcome unfair barriers to entry, without suppressing the continued growth and development of successful incumbents. Only where the absence of competition can be explained by a market's natural economics should the government intercede aggressively and embrace extensive ratemaking and other intrusive regulatory measures.

9. This Report finds that robust competition in the video marketplace has not yet fully evolved, but that the development of a fully competitive marketplace is possible. Our overall analysis suggests that the video marketplace is a highly dynamic sector in a state of transition. By fulfilling the Cable Act's promise of enhanced choices for the American viewer, the cable industry has generated intense demand for its multichannel service -- but in the process of meeting that demand, has accrued some degree of market power. With the developing field of existing and potential multichannel competitors to cable, however -- from wireless cable and proposed direct broadcast satellite services to home satellite dishes and satellite master antenna TV operations -- and with evidence that even direct competition between cable operators may increasingly occur, we are unwilling to endorse or recommend any drastic or long-term reregulation of cable rates and services. To do so could jeopardize gains made since the Cable Act was adopted. The public interest will instead be promoted by improving the conditions for competition.

10. Accordingly, while we desire to deal effectively with specific anticompetitive abuses, we find in this Report no need to encumber the cable industry with a harsh new regulatory regime. Rather, we propose to foster a more competitive marketplace for the distribution of multichannel video services. Our Report therefore proposes, first, the removal of certain undue regulatory barriers to multichannel service competition and, second, certain targeted and generally temporary restraints on certain cable industry practices which directly or indirectly impede such competition. We decline to propose more far-reaching rate regulation of the cable industry; such measures could unnecessarily jeopardize the wealth of viewing choices fostered by the Cable Act and delivered by the cable industry.

11. Notice of Inquiry. The Commission launched the study upon which this Report is based on December 12, 1989, adopting a comprehensive Notice of Inquiry ("Notice") in MM Docket No. 89-600, 5 FCC Rcd 362 (1989). In the Notice, we recognized the great strides the cable industry has taken in reshaping the video services market both locally and nationally, along with the significant consumer benefits these developments have brought. At the same time, we acknowledged that consumers, television broadcasters and other video service providers have complained that the cable industry has accrued market power and at times abused it. With the Notice, we sought to develop a factual record -- reliable evidence and empirical analyses of cable industry conduct and relationships -- that would enable us to judge the validity of these concerns. We anticipated that this record would provide the Commission with a reasonable basis for a comprehensive examination of the state of the cable industry today; the impact -- positive and negative -- that the Cable Act has had in attaining cable's current market development; and whether complaints and charges against the industry were isolated or symptomatic of widespread and fundamental market deficiencies.

12. In response to the Notice, we received more than 180 comments and nearly 70 reply comments.[20] To supplement information received in comments and reply comments, we also requested detailed ownership information from the top nine multiple system operators ("MSOs"),[21] conducted three field hearings,[22] requested written responses to follow-up questions after the hearings[23] and sought additional information from other parties.[24] Along with the General Accounting Office ("GAO"), we also conducted a survey of cable

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20 A list of the commenters and reply commenters appears in Appendix A. A few of these commenters filed in an untimely fashion. In the interests of compiling as complete a record as possible, and in view of the minimal disruption that these late-filed pleadings have caused, we hereby accept those pleadings. We also note that we have received numerous ex parte submissions (including letters, city resolutions and scholarly articles), which we have placed in the record.

21 Appendix B contains a list of the MSOs providing responses to the Commission.

22 The field hearings took place in Los Angeles, California on February 12, 1990; in Orlando, Florida on March 2, 1990; and in St. Louis, Missouri on March 15, 1990.

23 Appendix C contains a list of the parties providing responses to these follow-up questions.

24 Appendix D contains a list of the parties responding to these inquiries.

rates and services of nearly 2,000 cable systems (the "FCC-GAO survey"). In addition, we incorporated into this docket the records of two other related proceedings[25] and two relevant petitions.[26] Finally, we invited commenters to assess the extent to which different outcomes in ten other ongoing Commission proceedings regarding the video marketplace could enhance or thwart the development of vigorous competition in this market.[27]

13. Based on the record compiled in this and related proceedings, the Commission has reached the following principal findings, which are explained in detail in the remainder of this Report:

(1) Deregulation under the Cable Act has fostered the intended results: increases in investment, with corresponding expansion of cable reach, number of subscribers, channel capacity and new programming.

(2) The video marketplace continues to be a highly dynamic sector in the midst of transition. Cable television service consists of a

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25 Petition for Rulemaking in RM-5475 (filed by SATCOM, Inc., Feb. 21, 1986), proceeding terminated and record incorporated herein, 5 FCC Rcd 1113 (1990); Cable Signal Carriage Inquiry in MM Docket No. 88-138, proceeding terminated and record incorporated herein, 5 FCC Rcd 1109 (1990).

26 Association of Independent Television Stations, Inc. ("INTV") Petition for Notice of Inquiry (filed Dec. 21, 1988) ("INTV 70-70 Petition"); INTV Petition for Rulemaking and Supplemental Statement in Support of Notice of Inquiry (filed Oct. 23, 1989) ("INTV Cable Competition Petition").

27 These proceedings include: Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, CC Docket No. 87-266; Imposing Syndicated Exclusivity Requirements on Satellite Delivery of Television Broadcast Signals to Home Satellite Earth Station Receivers, Gen. Docket No. 89-89; Inquiry into the Need for a Universal Encryption Standard for Satellite Cable Programming, Gen. Docket No. 89-78; Review of the Technical and Operational Requirements of Part 76, Cable Television, MM Docket No. 85-38; Definition of a Cable Television System, MM Docket No. 89-35; Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, Gen. Docket 89-88; Amendment of the Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, MM Docket No. 87-24; Amendment of the Rules Concerning the Fairness Doctrine and Political Cablecasting Requirements for Cable Television Systems, MM Docket No. 83-331; Amendment of the Rules to Eliminate the Prohibition on Common Ownership of Cable Systems and National TV Networks, MM Docket No. 82-434; and Amendment of the Rules with Respect to the Form and Procedure of Ownership Reporting by Cable Television Systems, MM Docket No. 84-1297.

unique cluster of services comprised of retransmitted broadcast signals, premium programming, broadcast-like basic cable services and specialized basic cable network services such as ESPN, CNN, MTV and BET. Local broadcasters provide varying degrees of competition to cable's retransmission function, and, to a certain extent, to the more broadcast-like basic cable services. Also, video cassette rentals provide significant competition to premium movie services. Although broadcast stations offer some degree of the specialized programming provided by the specialized basic cable network services, they do not provide it full-time. Generally, there is no close substitute for that steadily-expanding complement of specialized program services offered by the typical cable system at this time. Competition from alternative multichannel providers such as second competitive cable systems, wireless cable (MMDS), satellite master antenna TV systems ("SMATV") and direct broadcast service ("DBS") satellites, while limited at present, is emerging. Indeed, if provided reasonable access to cable programming services, wireless cable, second competitive cable systems and SMATV operators have the potential to provide significant competition to cable. In addition, DBS has the potential, in our judgment, to become a strong competitor by the mid-1990s if recently announced plans go forward and DBS can obtain reasonable access to programming.

(3) Following sharp rate increases in the year after rate deregulation, average basic rate increases have moderated and increases in average total monthly bills (including premium services and equipment rental) have slowed recently to a level near the rate of general inflation. Additionally, the per channel price for cable service has increased at a rate significantly lower than inflation during this period. In any event, the rise in rates alone, without cost data, is not conclusive on the question of market power. That assessment requires analysis of additional factors.

(4) On balance, the evidence submitted in this proceeding suggests that cable operators possess varying degrees of market power in the local distribution of video programming.

(5) Horizontal concentration and vertical integration in the cable industry have increased significantly since enactment of the Cable Act. This growth has brought substantial benefits to American consumers, but also has added potential for certain anticompetitive conduct.

(6) Vertically integrated cable operators often have the ability to deny alternative multichannel video providers access to cable programming services in which such cable operators hold ownership

interests, and there is considerable anecdotal evidence that some have used this ability in anticompetitive ways.

(7) Most cable operators have the ability to deny or unfairly place conditions on the access of most program services to the cable communities they serve, and evidence suggests that some have done so. This ability reflects some degree of market power in the local video distribution market, which MSOs may leverage on an intermarket basis. It does not demonstrate, however, that national horizontal concentration has yet provided any single MSO with the unilateral ability to preclude the successful launch of new programming services.

(8) Although encouraging leased access programming was a key purpose of the Cable Act, existing enforcement provisions are too cumbersome to permit the development of leased access as a promising force in the video market. The lack of adequate remedies for any programmer denied fair access to local cable distribution has retarded the overall development of leased access programming.

(9) Local franchising requirements often discourage and even forbid competition, for reasons that have little to do with appropriate governmental interests such as public health and safety, repair of public rights-of-way and construction performance.

(10) The current compulsory copyright and right of retransmission regime for cable creates an imbalance in the relationship between the commercial broadcasting and cable industries. While the current compulsory copyright scheme is designed to reduce transaction costs in providing a cable antenna service, it also serves as an unfair subsidy for cable operators.

(11) Cable and broadcast programming compete for advertising revenues. Cable operators' incentive to deny carriage or to provide disadvantageous carriage (e.g., frequent or ill-timed channel repositioning) to programming services in which they have no financial interest appears to be particularly great as against local broadcasters. This creates a market disadvantage in local commercial broadcasters' ability to compete against cable operators for advertising revenues.

(12) The continued viability of noncommercial television (which by its very nature is affected by market forces in different ways than is commercial broadcasting) may depend on targeted mandatory carriage obligations for multichannel video providers.

(13) The current three-signal standard for effective competition no longer reflects the realities of the video marketplace. It would

be inappropriate, in our judgment, for the Commission to alter this standard at this time when Congress is actively considering legislation that would either expressly redefine or moot the effective competition standard for rate regulation. We are concerned, moreover, that redefining the effective competition standard in a way that would impose widespread and extensive rate regulation could unnecessarily undermine the growth in cable services.

(14) A general pattern of problems with cable technical quality and customer service has emerged since the passage of the Cable Act, although the industry has recently launched efforts to deal with customer service problems.

(15) Uniform federal technical standards for all cable video transmissions are essential to address cable technical quality problems and to prevent a patchwork of inconsistent technical standards in franchise agreements. Therefore, the Commission will launch an industry advisory process to that end.[28]

(16) At present, franchising authorities lack adequate enforcement mechanisms to compel cable operators to improve customer service to ensure high-quality service to the public.

14. In light of our findings, we make the following recommendations:

(1) To encourage more robust competition in the local video marketplace, the Congress should: (a) forbid local franchising authorities from unreasonably denying a franchise to potential competitors who are ready and able to provide service; (b) prohibit franchising rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers; (c) limit local franchising requirements to appropriate governmental interests (e.g., public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond); and (d) permit competitors to enter a market pursuant to an initial, time-limited suspension of any "universal service" obligation.

(2) Congress should remove legal barriers to entry for alternative multichannel providers by prohibiting local governments from regulating installation of reception equipment beyond those provisions reasonably related to clearly defined health, safety or reasonable aesthetic objectives.

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28 See infra para. 206.

(3) Congress should adopt a must carry regime[29] to safeguard local broadcast stations so long as the compulsory copyright license for local broadcast programming exists. This regime, including compulsory copyright, should sunset at the same time as any programming access provisions enacted pursuant to Recommendation (6). Either in the absence of or due to the expiration of any must carry regime, Congress should repeal the cable compulsory license and amend the Communications Act to provide local broadcast stations a clearly defined right to bargain for compensation for retransmission of their programming.

(4) Congress should adopt the industry-proposed must carry provisions for noncommercial television.[30]

(5) Congress should restrict changes in the channel assignment of local broadcast stations except under the following conditions: (a) when channel repositioning is mutually agreed to by the broadcaster and the cable operator; or (b) when technical limitations of the cable system prohibit carriage on a specific channel.[31] Adequate prior notice for any such repositioning must be provided to the station as well as to subscribers. This provision should sunset upon adoption of a retransmission consent regime.

(6) Congress should promote the emergence of alternative multichannel distributors by: (a) prohibiting any programming service in which a multichannel video provider holds a cognizable interest[32] from unreasonably refusing to deal with any competing multichannel provider in areas served by the multichannel provider(s) with

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29 We note that the commercial broadcasting and cable industries appear to have reached a compromise on must carry. See Communications Daily, July 23, 1990. Any rate regulation recommendations in that proposal are not encompassed in our must carry recommendation.

30 These provisions are described in Communications Daily, March 29, 1990, at 5.

31 We recommend that the restrictions placed on channel repositioning begin with broadcast channel positions as of June 29, 1990, pursuant to the industry compromise reached on channel repositioning. The terms of this compromise are reported in Communications Daily, July 23, 1990, at 1-2.

32 "Cognizable interest" is discussed later in the text of this Report. See infra para. 129.

which that programming service is vertically integrated; (b) defining "unreasonable refusals to deal" to allow (i) bona fide exclusive distribution arrangements that do not significantly impede competition in the local distribution market; and (ii) bona fide volume discounts;[33] (c) requiring local cable system operators, where they market cable network programs to other multichannel video providers within their franchise areas, to do so at reasonable and nondiscriminatory prices and terms; and (d) limiting these specific requirements to five years, by which time the Commission should report to Congress on the necessity of reenacting such requirements.

(7) Congress should provide clear, explicit and convenient administrative remedies for coercion by any multichannel service provider that requires a programming service to yield as a condition of carriage: (a) any financial interest in that programming service; (b) an exclusive distribution arrangement; (c) a refusal to deal with a competing multichannel provider; or (d) an unreasonably restrictive agreement not to compete with any programming service in which that multichannel service provider holds a financial interest.

(8) If the Congress adopts the measures proposed in Recommendations 6 and 7 above, it should authorize and instruct the Commission to report to the Congress within three years on the effect of such remedies in fostering competition in the video marketplace and whether direct limits on horizontal growth or vertical integration in the cable industry have become necessary.

(9) Congress should encourage leased access by: (a) adding "the promotion of robust programming competition" to the stated purposes of leased access obligations; (b) changing the burden and standard of proof required to establish a violation of the leased access rules; (c) providing the Commission with original jurisdiction to resolve disputes over the provision of leased access channels; and (d) requiring cable operators to provide billing and collection services for channel lessees pursuant to Commission rules.

(10) Congress should strengthen the authority and ability of local franchising authorities to enforce reasonable and effective customer service standards by expressly allowing them to impose

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33 In our view, bona fide volume discounts would be either cost-based or otherwise applied equally to both affiliated and unaffiliated customers.

penalties for violations thereof at any time in the life of a franchise.

(11) To the extent that any new cable legislation would impose significant administrative burdens on the Commission, Congress should appropriate the necessary funds or provide the Commission with the authority to impose cost-of-regulation fees to fund these activities adequately to fulfill its functions fully and effectively.

15. The remainder of this Report discusses in detail the bases for our findings and recommendations. Rates and the quality of cable services are of course the public's fundamental concerns; those will be, therefore, our starting points for reviewing cable industry developments under the Cable Act. Accordingly, in Section II, the first section of our detailed discussion, we assess the evidence regarding cable rates, programming offerings, technical quality and customer service.

16. In Section III, we examine the validity of allegations that, in fact, cable operators have accrued market power sufficient to explain the pattern of industry rate increases and service problems that have occurred since the Cable Act went into effect.

17. Section IV presents a discussion of programming access problems and our recommended response to cable systems' abuses, real or potential, of varying degrees of market power. Therein, we recommend taking action to foster increased competition by the emerging alternative multichannel video providers. We find that these alternative multichannel competitors may provide vigorous multichannel competition in the medium- and even near-term, but that their chance of providing such competition in all likelihood depends upon their ability to gain fair access to programming. Accordingly, we find that temporary, narrowly tailored remedial measures to promote fair access to programming for alternative providers are crucial to any competitive response to cable market power. In addition, we find that certain existing cable industry practices toward both cable programming services and the broadcast industry work to discourage healthy competition; we call, therefore, for limited, specifically-targeted remedial measures. We also find that the prevailing norm of exclusive cable franchises, coupled with an overly restrictive definition of the types of facilities that can be exempted from the franchising and other requirements of the Cable Act, impedes emerging competition. Section IV addresses these issues and sets forth the bases for our recommendations in these areas.

18. Finally, in Section V we take up the issue of complaints regarding customer service and technical quality.

II. FINDINGS REGARDING CABLE RATES AND SERVICE

A. Cable Rates

19. This section examines the changes in rates charged for cable services since the passage of the Cable Act of 1984. The discussion is based primarily on information from the results of the FCC-GAO survey of cable rates and services.[34] We also discuss comments submitted in response to the Notice. Both sources show that cable rates and services have increased significantly since 1984. The cause for the rise in basic cable service rates is a matter of sharp dispute among the commenters and, because the survey data focus only upon rates and services rather than upon the surveyed systems' various costs, they are inconclusive on this question.[35]

1. The FCC-GAO Survey

20. The FCC and GAO conducted a survey of cable systems, requesting certain information about cable rates and services since the passage of the Cable Act. The survey questionnaire was designed to elicit a picture of cable rates and services at specific points in time, generally in one-year increments, from December 31, 1984, to December 31, 1989. It requested information on three "tiers"[36] of service offered by the system: lowest priced basic tier (Tier I), the next lowest priced tier (Tier II) and the third lowest tier (Tier III). In addition to the changes in rates and services over time, the survey requested specific information regarding the responding system's size (subscriber count), whether or not the system has changed ownership, whether or not a multiple system operator currently has a

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34 In 1989, the General Accounting Office completed a more circumscribed survey of cable system rates and services. See General Accounting Office, Telecommunications: National Survey of Cable Television Rates and Services, Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives (Aug. 3, 1989) ("1989 GAO survey").

35 Without cost data, it is impossible to determine the extent to which increases in rates indicate some level of abuse of market power in the aggregate. For example, a direct comparison of cost data would necessarily reflect expenditures for increases in investment, expansion of cable reach, channel capacity and new programming, as well as declining costs of technologies, economies of scale and the low marginal cost of adding subscribers. These variables may offset concerns about rate increases.

36 A tier of service is the bundle of channels offered at a single collective rate. Tiers are usually offered cumulatively, so that Tier II is an add-on to Tier I, and Tier III is an add-on to Tiers I and II.

greater than 10 percent ownership interest, and whether or not the system was regulated at any time during the five-year period. This information has enabled us to compare rate and service data for four different types of cable systems.[37]

21. Data overview. Analysis of the survey data reveals that rates for basic services, as well as other rates affecting most cable subscribers, have indeed risen noticeably since 1986.[38] Monthly rates for the lowest price tier (Tier I)[39] increased by a total 36 percent during the three-year period (1986-1989).[40] In the same period, monthly rates for the most popular tier[41] of services -- the tier with the most subscribers -- increased on average a total of 38 percent.[42] During this same period, prices for Tier II rose an

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37 The tables setting forth the data discussed in this section all appear in Appendix F.

38 The FCC-GAO survey employed a stratified random sample of 1,971 cable systems, representing 22 percent of United States cable systems, but accounting for 62 percent of subscribers. Responses were received from 1,530 cable systems, yielding a substantial response rate of 77.6 percent. In addition to overall figures, the tables in Appendix F provide results for certain subsets of the sample, e.g., classified by number of subscribers. All of the survey data are subject to sampling error. Estimates or differences based upon a particularly small number of cases in a category as compared to the total universe for that category may not be statistically significant and, therefore, must be viewed with caution. See 1989 GAO Survey at 17.

39 The types of services on the lowest price tier vary from system to system. On some cable systems, this tier includes only over-the-air broadcast signals, while on other systems, this tier also contains additional signals (such as cable networks).

40 Tier I average monthly rates increased 15.5 percent from November 30, 1986 to December 31, 1987; 8.5 percent from December 31, 1987 to December 31, 1988; and 8.6 percent from December 31, 1988 to December 31, 1989. See Appendix F, Table 1A. The total percent increase in rates for the three-year period reflects a compounding of the individual yearly percent increases.

41 For each cable system, the most popular tier is either Tier I, Tier II or Tier III. The tier designated most popular is the one for which the system reported the most subscribers. Consequently, the data used to generate information about this tier are actually a mixture of data from Tiers I, II and III.

42 For the most popular tier, the average monthly rates increased 14.5 percent from November 30, 1986 to December 31, 1987; 10.4 percent from December 31, 1987 to December 31, 1988; and 9.0 percent from December 31,

average total of 21 percent, while subscribers to Tier III saw their rates rise an average total of 28 percent.[43] The increases in the average subscriber's total monthly bill, however, have slowed during this period from 7.1 percent in 1987 and 7.2 percent in 1988, to only 5.4 percent, or slightly above the general rate of inflation, in 1989 (4.8 percent).[44] It is important to note, however, that because of the increase in the number of channels provided, the cost per channel to the subscriber for Tier I rose a total of only seven percent ($0.04) during this period.[45] Moreover, the rates for some selected and less popular tiers increased very little or not at all.[46] Also, while subscribers in systems sold during the survey period experienced greater rate increases than subscribers in unsold systems, repeated sales did not appear to be associated with larger rate increases than systems sold only once.[47]

22. Focusing upon rates for the least expensive tier of services, Tier I, the survey revealed that subscribers to this tier saw an annual rate increase of 15.5 percent from November 1986 to December 1987 (the first year in which most cable systems experienced rate deregulation).[48]

1988 to December 31, 1989. See Appendix F, Table 1B.

43 Tier II average monthly rates increased 7.7 percent from November 30, 1986 to December 31, 1987; 5.4 percent from December 31, 1987 to December 31, 1988; and 6.3 percent from December 31, 1988 to December 31, 1989. For Tier III, the average monthly rates increased 10.4 percent from November 30, 1986 to December 31, 1987; 11.0 percent from December 31, 1987 to December 31, 1988; and 4.1 percent from December 31, 1988 to December 31, 1989. See Appendix F, Table 1B.

44 See 1989 GAO Survey at 57.

45 It is important to note, however, that cable subscribers typically do not purchase cable services on a per channel basis.

46 See Appendix F. Furthermore, the analysis above reflects changes since 1986 only. Prior to 1986, the average rate increases from December 31, 1984 to December 31, 1985, and from December 31, 1985 to November 30, 1986 for Tiers I, II, and III are as follows: Tier I -- 5.1 percent and 7.0 percent; Tier II -- 5.2 percent and 3.3 percent; and Tier III -- 8.4 percent and 4.5 percent, respectively for all three tiers. Inflation during this period was 3.6 percent in 1985, and 1.9 percent in 1986. See id. at Table 1A.

47 See id. at Tables 4A, 4B, 4H and 4I.

48 For information about the pattern of rate increases for the other tiers of cable service, see Appendix F.

During the subsequent two years, rates for the entire package of service comprising Tier I continued to rise, but not nearly as sharply as in the first year following deregulation, i.e., 8.5 percent in 1988 and 8.6 percent in 1989. During the same three-year period, the average number of channels included in the Tier I package grew nearly 28 percent, from 18 to 23. This meant that for this tier, the cost per channel to subscribers increased only $0.04, from $0.57 to $0.61 during the 1986-1989 period.

23. The effect of system size on rates. We also have separated cable systems into five groups based on the number of their subscribers[49] and compared the changes in the average monthly rates, number of channels and charge per channel for the most popular tier among the five groups. The purpose was to discover whether there was any correlation between the size of a cable system and the rate changes experienced by its subscribers. The rates, number of channels and price per channel within each of these groups increased over time in a manner comparable to that of the entire sample.[50] In general, however, larger systems had a higher average monthly rate but a greater number of channels, with a concomitant lower price per channel to the subscriber.[51]

24. The effect of MSO ownership on rates. In 1986, the average monthly rate for the most popular tier of services offered by systems with minimal or no MSO ownership ("non-MSO systems") matched fairly closely the average rate charged by systems held by MSOs, with non-MSO systems having slightly lower figures. In the next three years, MSO systems raised rates somewhat faster than non-MSO systems, thus increasing the difference between the rates charged by the two types of systems. At the same time, however, MSO systems increased their channel capacity more than non-MSO systems, so that the monthly price per channel for MSO systems increased at about the same rate as for non-MSO systems.[52] Although the average number of channels that both types of systems

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49 The five groups were composed of cable systems with subscriber counts of 1 - 1,000; 1,001 - 3,500; 3,501 - 10,000; 10,001 - 50,000; and 50,000+ respectively.

50 Compare Appendix F, Table 1B with Tables 2A - 2E.

51 See id. at Tables 2F - 2H.

52 Cable operators were asked if any of the 25 largest MSOs had an ownership interest greater than 10 percent in their systems as of December 31, 1989. MSO ownership interest in systems prior to that date cannot be determined from the survey. Therefore, the data in Appendix F, Tables 3A and 3B, present the historical picture of rate changes since December 31, 1984, only for those systems whose MSO ownership status is known as of December 31, 1989. The most popular tier data for such systems is presented in Appendix F,

included in their most popular tier of services grew steadily, the number of channels offered by the MSO systems was consistently greater than that offered by non-MSO systems.[53]

25. The effect of sales on rates. For the most popular tier of service, we also compared rates charged by cable systems experiencing at least one ownership change since December 31, 1984 with those charged by systems with no ownership change.[54] Our goal was to see whether rates rose more sharply for those systems that underwent a change in ownership during this period. The comparison revealed that while the average monthly rates for those systems that were sold[55] were generally slightly higher than the rates for those systems not sold,[56] the annual increase in rates for both groups of systems, when expressed as a percentage of the preceding year's rates, were comparable. Charges per channel, however, were markedly different. For systems that were not sold during the period, the average price per channel for the five-year time span fluctuated between $0.51 and $0.54 per channel, ending the period at $0.54. For systems that were sold, the average price per channel increased from $0.52 to $0.64 -- ten cents more per channel than for systems not sold. Moreover, by December 31, 1989, systems sold during the five-year period offered on average three fewer channels in the most popular tier than did the unsold systems.[57]

Table 3A. For comparison purposes, the most popular tier data for systems with no (or less than 10 percent) MSO interest as of December 31, 1989, appears in Appendix F, Table 3B.

53 On November 30, 1986, MSO systems averaged five more channels than non-MSO systems (23 vs. 18). By December 31, 1989, the difference had grown to seven channels (30 vs. 23). For MSO systems, price per channel ranged from $0.50 on November 30, 1986, to $0.54 on December 31, 1989, while for non-MSO systems these figures were $0.61 and $0.65, respectively.

54 The FCC-GAO survey revealed that 728 systems had experienced at least one ownership change during the five-year period covered by the survey, while 763 systems had no ownership change in this period.

55 Systems that indicated a change in ownership in each year since 1984 have their five-year historical data displayed in Appendix F, Tables 4C through 4G. Table 4C presents the most popular tier data for those systems that changed ownership in 1985. Similarly, tables 4D, 4E, 4F and 4G presents the most popular tier data for those systems that experienced an ownership change in 1986, 1987, 1988 and 1989, respectively.

56 See Appendix F, Tables 4A and 4B.

57 GAO reported that analysis of the data for systems that were sold did not reveal a pattern of basic service rate increases following the sale of

26. We also compared the most popular tier rate changes of systems sold more than once during this period to the rate changes of systems sold only once in this period. Our purpose was to see whether the rates for systems experiencing repeated ownership changes rose more than rates for the other systems. We found that with the exception of December 31, 1984, rates, the average rate for systems that experienced more than one ownership change over the five-year period was slightly higher in each year of the survey than the average rate for systems sold only once.[58] The percentage by which monthly rates for systems that experienced more than one ownership change increased from the monthly rates charged during the preceding year was higher in 1985, 1986 and 1988, but lower in 1987 and 1989 than for all other systems. Also, with the exception of 1985, the price per channel was lower for systems that experienced two or more ownership changes than for systems with only one ownership change. Furthermore, from 1986 to 1989, systems that experienced two or more ownership changes offered, on average, one channel more to subscribers than systems with only one ownership change.

27. The effects of regulation on rates. Survey questions linking rates and regulation requested data for only December 31, 1984, November 30, 1986, and December 31, 1989. Survey responses reveal that on all three dates, systems that were regulated had lower average rates than those that were not regulated.[59] For the first two dates, the average number of channels offered

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the cable system. GAO compared the dollar amount of increases in monthly rates occurring immediately after systems changed ownership with increases in monthly rates during the same period for systems that did not change hands, and found the differences were not statistically significant. See 1989 GAO survey at 28. This analysis, however, does not account for any rate increase initiated other than shortly after the sales transaction. We performed additional analyses comparing the change in basic monthly cable rates for systems that sold (in the years in which they were sold) to the final 1989 basic cable rates of those systems. This result was compared to the change in basic cable rates for systems that never sold for the same time periods. A statistical test was performed to test whether the differences between the average rate increase for each type of system was or was not statistically significant. Cable rate increases for systems that were sold in 1985, 1986 and 1988 were not significantly different from rate increases for those systems that never sold. For those systems that were sold in 1987, however, the average rate increase from 1987 to 1989 was higher than the average rate increase for those systems that were not sold during the same time period.

58 See Appendix F, Tables 4H and 4I.

59 See id. at Tables 5A and 5B.

were about the same for both types of systems. However, on December 31, 1989, non-regulated systems offered an average of 27 channels compared to 20 for regulated systems. Thus, the price per channel was higher for non-regulated systems than for regulated systems on the first two dates, but on December 31, 1989, the price per channel for regulated systems was 10 cents higher than for non-regulated systems ($0.68 vs. $0.58, respectively).[60]

28. Other factual findings. Additional specific findings gleaned from the data (set forth in Tables in Appendix F) include the following:

The average number of active channels increased from 23 on December 31, 1984, to 27 on November 30, 1986, to 32 on December 31, 1989 (Table 6). Almost all of this increase can be attributed to the increase in basic service channels (Table 7), and all of the increase in the number of basic service channels is due to an increase in the carriage of basic cable networks (Table 8).

The average rates for each of three premium channels (HBO, Showtime and Cinemax) increased from December 31, 1984, to November 30, 1986, but then decreased, generally returning to December 31, 1984 rate levels by December 31, 1989 (Table 9).

The average number of network affiliates, other commercial and non-commercial stations available over-the-air in a cable system's franchise area remained constant at four, three and two, respectively (Table 10).

Almost half (48.5 percent) of the respondent systems changed ownership at least once since December 31, 1984 (Table 11).

The percentage of responding cable systems that were rate-regulated on December 31, 1984, decreased slightly by November 30, 1986 (76 percent to 73 percent), and, as expected, fell dramatically to less than 3 percent by December 31, 1989 (Table 12).

2. Information from Commenters

29. The rate information submitted by commenters is primarily anecdotal. Accordingly, no specific conclusions can be drawn from this information alone. Nevertheless, the comments are instructive insofar as they bear upon the information contained in the FCC-GAO survey. We intend to rely on the joint

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60 It is important to note, however, that there were only 41 cable systems claiming regulated status on December 31, 1989, while 1,419 claimed no rate regulation. Such a disparity in the number of observations warrants extreme caution when making comparisons.

FCC-GAO survey as a general indicator of the industry's rate setting performance over the last five years. We note, however, that the comments in this record do highlight the difficulties of drawing any conclusions from the rate data revealed by that survey. For example, while the FCC-GAO survey indicates that average monthly basic service rates rose only 36 to 38 percent over the three years between November 1986 and December 1989, commenters describe situations in which individual cable operators more than doubled their rates in this time period. Given these instances of rate increases far more extreme than the national average, there have clearly existed numerous cable operators whose rate increases during this period have been far more modest even than the national average. Understandably, however, few municipalities actually came forward to state that they have had no or slight rate increases. Fairfax County, Virginia notes that from 1986-1989, basic service rates in that jurisdiction rose from $4.95 to $10.95, a total increase of 121 percent.[61] Hawthorne, California states that subscribers in that city saw basic cable rates increase from $6.95 in November 1986 to $16.95 in December 1989, a total increase of 144 percent.[62] During this same period, basic service rates in Kearney, Nebraska increased a total of 90 percent, rising from $8.90 to $16.90 per month.[63] In Los Angeles, one cable franchisee raised monthly basic service rates from $7.50 to $15.99 from 1986 to 1989, while a second raised its basic service rates from $8.40 to $17.80 from 1986 to 1989.[64] This meant that subscribers to the first system saw rates increase a total of 113 percent between November 1986 and December 1989; subscribers to the second system saw rates rise a total of 112 percent during the same time period. In Torrance, California, the cable franchisee raised the monthly charge for basic cable services from $7.50 to $16.95 between November 1986 and December 1989, a total increase of 126 percent.[65] During this same period, subscribers in Somerville, Massachusetts saw their monthly rate for basic cable services more than double, rising from $8.50 to $16.95, a total increase of 121 percent.[66]

30. There was little dispute among the commenters that basic cable rates have increased from November 1986 (the beginning of deregulation) to the

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61 See Comments of Fairfax County, Virginia at 5-7.

62 See Comments of City of Hawthorne, California at 9.

63 See Comments of City of Kearney, Nebraska at 1-2.

64 See Comments of Los Angeles, California ("Los Angeles") at 6-10.

65 See Comments of City of Torrance, California at 2.

66 See Comments of Massachusetts Community Antenna Television Commission ("Massachusetts CATV Commission") at 4.

present time. Rather, the major points of contention concern the degree, significance and causes of these increases. On one side of the debate, a large number of commenters cite price increases since deregulation as evidence of uncontrolled monopoly behavior on the part of the cable industry. In addition, some commenters stress that increases understate the increased charges to subscribers because they do not take into account large increases in fees for other services, such as charges for additional outlets and installation.[67]

31. Cable interests and other commenters criticize many of the proffered rate figures on several different counts and offer explanations to justify the rate increases. Cable commenters state that comparisons of basic rates from one year to another do not take into account the fact that new channels have been added to the basic tiers. These commenters explain that programming costs have increased dramatically, that cable systems incur substantial costs upgrading and expanding their facilities and that other costs imposed by franchising authorities explain much of the increase in rates.[68] They believe that decreases in pay service offset the increases in basic service. Finally, commenters such as Tele-Communications, Inc. ("TCI") and NCTA state that basic rates were artificially low before deregulation, and

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67 See, e.g., Joint Comments of City of New York, National League of Cities, et al. ("NYC/NLC") at 9-12. Various commenters contend that fees for additional outlets that were less than $5 before deregulation increased by $2 or $3. See, e.g., Attachment A of Comments of Cities of Burnsville and Eagan (additional outlet charge rising from $3.95 to $5.20 after deregulation); Comments of City of Tallahassee, Florida at 3 (monthly rates for additional outlets with converters rising from $1.50 to $4.00). Others point to installation charges that have jumped by a total of 200 percent. See, e.g., Attachment A to Comments of Cities of Burnsville and Eagan (aerial installation rates rising from $19.95 to $59.95); Comments of City of Kearney at 1 (installation rates rising from $0. to $27.41); Joint Comments of City of Dubuque, Iowa, Montgomery County, Maryland, and City of St. Louis, Missouri ("Dubuque, et al.") at 15 (Montgomery County installation rates increasing a total of 256 percent).

68 For example, Concord Cable contends that its programming costs from 1986 to 1990 increased overall by 120 percent, and that one-third of its $3.10 increase in basic service charges reflects the increase in programming costs. Similarly, the New England Cable Association ("NECA") claims that one cable system pays a franchise fee three times more than the state law defined cap and has been required to expend substantial funds for such franchise-required projects as renovating a city-owned building for use as an access studio, purchasing and maintaining access equipment, funding public access and renting the access studio; according to NECA, such costs explain a significant percentage of the system's rate increases.

that rates are just now reaching competitive levels and are therefore leveling off.[69] These commenters conclude that when all these factors are taken into account, rate increases compare very favorably to the increases in the CPI.[70]

32. In order to reach any definitive conclusions regarding the cause of the rate increases revealed in the FCC-GAO survey and in the comments, price change information must be supplemented by reliable cost data. We possess only limited information on costs.[71] For example, the material submitted by Continental Cable indicates that from 1986 to 1989, its operating expenses went up by 22 percent, and programming expenses, a component of operating expenses, rose by 28 percent.[72] We note that operating expenses account for

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69 Thus, commenters like TCI contend that a short term comparison of rates is not a fair one. According to TCI, the average price of basic service from 1972 to 1986 rose at a significantly slower pace than the Consumer Price Index ("CPI") for all consumer goods, and that the increases after 1986 (during deregulation) still have not compensated for inflation since 1972. See Comments of TCI at 24-26.

70 Those opposed to this line of analysis dispute the underlying assertions. For example, NYC/NLC asserts that increases in cable rates exceed the cost of added programming or improved service. See Comments of NYC/NLC at 8-9. The Wireless Cable Association ("WCA") attributes rate increases to debt accumulation rather than compensation for previously overregulated rates. See Comments of WCA at n.6. The Massachusetts CATV Commission asserts that rate increases are not justified by the increase in number of programming channels, because the increase in channels has partially resulted from the proliferation of home shopping channels and others that cost little and that share their profits with the cable operators. See Comments of Massachusetts CATV Commission at 5. While the data alone cannot be analyzed with respect to market power, we do attempt to analyze market power based on the other factors. See infra paras. 46, 54-59.

71 In the absence of specific cost data, some commenters have suggested that expressing prices on a per channel basis and then deflating per channel price increases by the economywide inflation rate (i.e., CPI) during the relevant period give an accurate picture of how the nature of basic service has changed over time. Using data from the FCC-GAO survey, we find that the per channel price of basic service rose 7.0 to 7.4 percent from November 30, 1986 to December 31, 1989 (equivalent to an annual rate of under 2.5 percent), depending on the definition of basic service used. This measure too is imperfect because it does not directly capture changes in the cost of cable channels.

72 These data appear in Cable Television Operations and Finance: Seminar for the Federal Communications Commission Staff, an ex parte presentation made

60 percent of total revenues in the cable systems in this sample.[73] We also possess only limited information concerning the underlying costs of adding channels to the system.[74]

3. Conclusions

33. The comments clearly support the principal conclusions that we have derived from our analysis of the FCC-GAO survey data. Following the sharp rate increases in the first year following widespread rate deregulation, the upward trend in basic cable rates has moderated and the recent rate of increase for all services (basic and pay) is only slightly more than that of general inflation. In fact, the average price of basic cable service when measured on a per-channel basis has increased at a rate significantly lower than inflation during the past three years.

34. Of course there have been systems for which rates increased substantially more than the average. We believe that these limited individual cases -- including cases in which system operators more than doubled cable service rates during this period -- contributed to some consumers' outcry and the broader concerns that cable operators exercise market power. As the preceding analysis shows, cable rate increases during this period were, on average, far more moderate. There is more than one possible explanation for the rate increases documented in the FCC-GAO survey and in our inquiry. On the one hand, the rate increases revealed by our inquiry and survey may reflect only a one-shot "correction" to rates that had been constrained below reasonable levels before deregulation. On the other hand, because market power manifests itself as an ability to raise and hold prices above cost over a protracted period, these increases might, as some commenters suggest, be evidence of market power. Lacking essentially any cost data, however, we are unable to draw a conclusion about why cable service rates rose or the degree to which these rate increases reflect market power. In particular, we cannot

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by Continental Cablevision on March 26, 1990 ("Continental Cablevision Presentation").

73 Continental Cablevision Presentation.

74 In the retiering now underway it is not unusual to see the modified tier offered at a price only slightly less than the pre-retiered price, with the remaining channels offered for one or two dollars more. We do not have information adequate to determine the extent to which cable customers preferred significant rate increases with additional channels to rate stability without additional channels on the Tier I and II packages of services. Further, we have no cost data regarding franchise fees or improved customer service or technical compliance requirements.

conclude that the price increases reflect a pattern of anticompetitive behavior or a definitive degree of market power by the cable industry.

B. Cable Service

35. The commenters who complain about rising rates also express an additional concern -- that as rates have increased, the quality of cable service has remained static or declined. This section examines this concern in light of the three basic areas of service covered by the record in this proceeding: (1) technical service, such as picture quality; (2) nontechnical service, such as installations, repairs, continuity of service, telephone interaction and billing practices; and (3) the number and quality of programming services offered by cable systems. As discussed in detail below, the number and quality of programming services offered by cable systems have increased significantly, but the record reveals a pattern of dissatisfaction with the quality of technical and customer service rendered by many cable systems.

1. Technical Cable Service

36. On the issue of technical cable service, the record in this proceeding adds little to the record already established in our pending cable technical standards proceeding (MM Docket No. 85-38). In 1988, the Commission solicited comments in MM Docket No. 85-38 on its proposal to extend the FCC's voluntary technical guidelines[75] for video signals carried on class I cable channels to cover video signals carried on class II and class III channels.[76] At present, local authorities are permitted to adopt our guidelines as franchise requirements for class I channels. These authorities also may adopt less stringent requirements, but they are prohibited from imposing stricter standards for class I channels or any standards for class II through IV channels.

37. The comments in MM Docket No. 85-38 were fairly polarized. Cities and allied interests argued that cable technical service is often unsatisfactory, that the Commission should adopt mandatory standards for class

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75 47 C.F.R. § 76.605(a).

76 Further Notice of Proposed Rule Making in MM Docket No. 85-38, 3 FCC Rcd 5966 (1988). Commission rules separate cable channels into four classes, or categories. See 47 C.F.R. §76.5(t)-(w). In general, class I channels carry broadcast programming; class II channels deliver non-encoded cablecast programming; class III channels carry encoded cablecast programming and non-video, non-interactive communications; and class IV channels carry interactive communications.

I, II and III channels and that local authorities should have the discretion to adopt stricter standards. While not opposing the Commission's proposal to extend the reach of its voluntary guidelines beyond the class I channels, cable interests asserted that any other expansion of the standards is unnecessary. All parties agreed that the Commission should not adopt technical standards for class IV channels; the franchising authorities, however, argued that they should be permitted to set such standards for their franchisees.

38. In the current proceeding, the Commission again sought information about the technical quality of existing cable service, which resulted in some additional evidence in the record suggesting that the technical quality of cable service could be improved. NYC/NLC cites the experience of some franchise areas in Illinois in which the cable operators' services not only fail to meet our guidelines but continue to deteriorate. In its reply comments, NYC/NLC reports the results of recent surveys of customers served by two cable companies in New York City. Forty percent of the surveyed customers of Manhattan Cable, which serves the southern half of Manhattan, rated their cable television reception as "fair" or worse. Since approximately 28 percent of those responses were in the "fair" category, 88 percent of Manhattan's customers surveyed rated their cable television reception as "fair" or better. Nearly 61 percent complained of prolonged or repeated picture or sound problems in the last two years; almost 42 percent experienced picture or sound problems in the thirty days preceding the survey. For Paragon Cable, serving the northern half of Manhattan, the results were only slightly better. Thirty-five percent of its customers rated their cable television reception as "fair" or worse. Since approximately 26 percent of those responses were in the "fair" category, 91 percent of Paragon's customers rated their cable television reception as "fair" or better. Slightly more than 56 percent of Paragon's customers reported repeated or prolonged picture or sound problems within the last two years; 28 percent reported picture or sound problems within the thirty days preceding the survey.

39. Cable operators contend that problems with technical quality of cable service generally occur with older systems or with systems that are in the process of upgrading their facilities. In addition, cable operators generally state that since the passage of the Cable Act, they have spent substantial sums to improve the quality of the picture they transmit to their customers. While there is evidence in the record of substantial investments on the part of the cable industry in facility upgrades, these investments largely represent an increase of capacity or upgrade in programming, and are not directly responsive to consumer complaints regarding the technical quality of service. Based on the evidence submitted in MM Docket No. 85-38 and in this proceeding, we find that there is a pattern of technical problems with cable service. As more fully discussed below in Section V-B, we believe the best course is to encourage further inter-industry negotiations to develop a consensus proposal on mandatory federal standards, in order to prevent a patchwork of inconsistent technical standards in franchise agreements.

2. Cable Customer Service

40. As with technical service, the record reveals a pattern of customer service problems. Numerous commenters, including individual subscribers, complain that cable operators are often inaccessible or difficult to reach by telephone, rude in their dealings with the public, unresponsive or unaccommodating to repair requests and slow or unhelpful in correcting billing errors. Complaints also were raised regarding the difficulty of receiving credit for service outages, installation delays in wired areas and unredressed property damage in connection with installations. Los Angeles reports a steady increase in consumer complaints, culminating with a rate of 23.6 oral and written complaints per 10,000 subscribers for all of its franchisees during the last quarter of 1989.[77] The NYC/NLC survey of the two cable operators serving Manhattan reflects a myriad of problems in telephone, repair and billing service.[78] Other franchising authorities report numerous service complaints,[79] although a minority indicates that nontechnical service provided by their franchisees is acceptable.

41. Cable interests generally acknowledge that there are incidents of poor service, but they state that service is, for the most part, adequate, and that many of the problems are transitional, reflecting the usual difficulties that attend dramatic, rapid industry growth and facilities upgrades.[80] A number of cable commenters have pointed to NCTA's "Recommended Cable Industry Customer Service Standards" to show that the cable industry is concerned about consumer complaints and intends to improve its service. In February 1990, NCTA adopted these voluntary consumer service standards to govern office and telephone availability, installations, outages and service calls, communications, bills and refunds. Critics of the cable industry state that NCTA does not anticipate general compliance with these standards until July 1991 and that, until then, cable systems will continue to provide service at a level below that which any non-monopoly enterprise already must meet

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77 See Comments of Los Angeles at 22. It should be noted, however, that the complaint ratios cited by Los Angeles appear to include complaints about rates and technical service, as well as nontechnical service.

78 See Attachment to Reply Comments of NYC/NLC. For example, the results for both systems show that more than half of the subscribers who attempted to call their cable system during the last two years were, in their last attempt to phone, placed on hold for more than one minute or were never connected.

79 See, e.g., Comments of Dubuque, et al. at 20; Comments of City of Hawthorne, California at 10; Comments of City of Santa Ana, California at 8; Comments of City of Torrance, California at 4.

80 See, e.g., Comments of Time Warner at 20.

every day to stay in business.[81] According to Dubuque, the NCTA voluntary standards constitute "an extraordinary admission by the cable industry that its treatment of consumers is generally abysmal now."[82] NYC/NLC contends that the NCTA standards, while welcome, are insufficient to resolve current problems because the standards are voluntary and, depending on the needs of given community, may be inadequate.[83]

42. Our own analysis of the entire record leads to the conclusion that there is, at this point, a pattern of problems with the customer service offered by the cable industry. As described elsewhere in this Report, there currently is insufficient competition to provide a check on the quality of service offered by cable operators and responsive measures thus are necessary to ensure that consumers receive adequate service quality. Accordingly, in Section V-B below, we recommend that Congress clarify the subscriber protection provisions of the Cable Act to increase the effectiveness of the powers given to local franchising authorities to oversee the customer service practices of cable operators.

3. Programming Fare

43. There is no question that the number of programming services offered by cable systems has increased substantially since the passage of the Cable Act in 1984. As we observed in the Notice, the number of existing or proposed cable services in 1984 was reportedly 67, while in 1989, the number of domestic existing and proposed pay TV and satellite cable services was reportedly 181.[84] In the first two years after deregulation (1986-1988), cable systems, on average, added five to six programming channels to their basic service tiers, according to the first GAO survey.[85] The next year (1989), cable systems generally added another one to two more channels to their basic service tiers, according to the FCC-GAO survey.[86]

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81 See, e.g., Reply Comments of City of Dubuque, Iowa ("Dubuque") at 15-16.

82 Id. at 15.

83 Comments of NYC/NLC at 35-36.

84 See Notice, 5 FCC Rcd at 376 n.8, citing 53 Television & Cable Factbook, Cable & Services at 166-71 (1985 ed.) and 57 Television & Cable Factbook, Cable & Services at C-3 (1989 ed.).

85 See 1989 GAO survey at 3.

86 See Appendix F, Tables 1A and 1B.

44. Individual reports by commenters also reflect the increase in the number of programming services. Twenty-three observations in the comments report an average of nine additional programming services from 1986 to 1989, almost all of which were cable networks. A number of cities, however, complain that many of the additional services are home shopping networks, which these parties state are of little value to consumers.[87] In contrast, cable interests and others have supplied extensive evidence that the cable industry has developed a substantial amount of "high quality" programming since deregulation.[88] Moreover, programming expenditures by the cable industry have increased dramatically. NCTA states that the amount invested annually in basic cable programming has more than tripled since 1984, estimating that between 1984 and 1989, cable operators' yearly expenditures on basic cable programming increased from $302 million to $965 million.[89]

45. Conclusion. While the record clearly reflects a substantial increase in the number and quality of programming services offered on cable systems, it does not necessarily lead to any conclusion about the appropriate level of cable rates.

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87 See, e.g., Comments of NYC/NLC at 9.

88 For example, Continental Cablevision of Western New England, Inc., describes the award-winning local programming efforts of its systems (which serve 136,000 subscribers overall). See Reply Comments of Continental Cablevision of Western New England, Inc., at 7-8. The National Association of Broadcasters ("NAB") acknowledges that "[c]able provides numerous unique services and niche programming which could not otherwise be made available in most markets," and that "in this regard the growth of cable has [undoubtedly] been a public good." Reply Comments of NAB at 2.

89 Comments of NCTA at 17-18. In support of this assertion, NCTA relies on data compiled by Paul Kagan Associates, Inc., a leading industry analyst.

III. THE COMPETITIVE POSITION OF CABLE TELEVISION IN THE VIDEO MARKETPLACE

A. Local Distribution of Video Programming

1. Summary Statement

46. In general, consumers today have a wider range of video services from which to choose than ever before. Local cable television service provides, via a single medium, a cluster of video services the components of which are also frequently available from other sources. Our analysis of the local market for distribution of video programming, based on the extensive record we have compiled in this proceeding, indicates that cable operators possess some market power; though the degree of market power cannot be quantified precisely and varies across markets, depending on a variety of factors.[90] This conclusion is based on our analysis of the services offered by cable and its rivals, and on calculations of the "q ratio," a statistical measure that has been used to quantify market power. Studies of the impact of broadcast signal availability on cable rates are also consistent with the finding of varying degrees of market power.

47. The fact that cable operators possess varying degrees of market power does not mean that other delivery media do not compete with cable. Broadcast television and videocassette rentals provide substitutes for some, but not all, of the services offered by cable, and thus constrain the behavior of cable operators to some extent. Moreover, the degree of competition confronting cable is expected to increase over time. Rivals such as SMATV, MMDS, home satellite dishes (HSDs), and second cable systems will probably expand their coverage, and DBS service may begin to have a significant impact in four or five years. Hence, we will focus our recommendations and actions in this area on encouraging rival multichannel video providers to enter the market and on invigorating the existing competition to cable as soon as possible.

2. The Relevant Market

48. The conceptual framework for delineating the relevant market comes from antitrust analysis. Relevant markets have both a geographic and a product-line dimension. In the case of cable, the principal geographic market is local. Most cable systems operate under a local franchise that describes the area within which they are entitled to distribute video services. Moreover, cable systems in different areas do not compete with each other for subscribers.

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90 See supra note 19.

49. Delineation of an appropriate product market is complicated, since a variety of other media clearly compete with cable systems in the provision of various categories of programming. Thus, our assessment of the degree of competition in the relevant product market must be based on examining the extent to which consumers can and do utilize other media to obtain reasonable substitutes for the services that cable television offers. Commenters differ on the degree of substitutability actually provided by the media enumerated above and on the significance of that substitutability for public policy.

3. Characteristics of Cable and Rival Media -- Reasonable Interchangeability

50. The services provided by cable television systems can be divided roughly into four categories. First, because cable can offer a high level of signal quality, it serves as an "antenna service," delivering quality reception of retransmitted local broadcast signals. Second, cable offers "premium" programming, such as recent movies, usually without commercial interruption. Third, cable offers some general interest basic channels similar to independent television stations, such as USA Network and TNT. The wide array of specialized basic services like CNN, ESPN, MTV, and BET constitutes the fourth service category.[91]

51. The evidence shows that different media provide competition for different components of cable service. The availability of comparable off-air broadcast television service is a good substitute for cable's "antenna service" function. The substantial penetration of VCRs and the ubiquity of tape rental stores provides a good substitute for commercial-free movie channels.[92] Indeed, tape rental has some desirable characteristics that compare favorably with those of premium cable channels.

52. With respect to the third and fourth components of cable service, satellite-delivered basic channels, broadcast signals offer some degree of competition to the more broadcast-like basic cable services. As noted above, some basic services offer programming similar to that of independent broadcast stations and, in fact, distant broadcast signals represent a

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91 Cable systems are able to provide these categories of service because of two key characteristics: (1) multiple channel capacity (which permits the provision of a wide range of programming); and (2) the ability to charge viewers for the service.

92 The two services do differ, of course, with movie channels offering some first-run and sports programming, plus added convenience, and tape rental offering time flexibility, selection, and the ability to pay only for programs one specifically chooses to view.

significant component of basic cable viewing. Furthermore, the type of material offered by specialized cable services such as CNN, ESPN, MTV, Nickelodeon, BET, and C-SPAN,[93] which comprise the final component of cable service, is available to some extent from broadcast signals, particularly in markets with many such signals.[94] Broadcast channels generally do provide news, sports, weather, music videos, childrens' programming, and minority-oriented programming. However, such programming is not available over-the-air on a full-time basis as it tends to be on cable, thus making the specialized cable channels that provide such programming highly valued by subscribers who particularly like the type of specialized programming they provide. Of course, there are certain exclusive live events on cable, such as the National Basketball Association playoffs on TNT, for which an exact substitute is not available. Nevertheless, the large, albeit gradually declining, share of cable household viewing accounted for by local broadcast signals suggests that sufficient broadcast signal availability can constrain the ability of cable systems to raise prices for basic cable service and local signal retransmission.[95] At the same time, the growing share of viewing accounted for by cable network viewing underlines the drawing power of cable networks.

53. Some commenters proposed an extremely broad product market definition, including information and leisure entertainment services. By

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93 CNN is a 24-hours news service, ESPN is a national sports channel, Nickelodeon is a children's service, BET is a service designed to showcase programming from the perspective of Blacks, and C-SPAN carries Congressional proceedings.

94 It is well established that as the number of broadcast signals in a market increases, more and more specialized programming is offered. For a discussion of the mechanics of this process, see Wildman and Owen, Program Competition, Diversity, and Multichannel Bundling in the New Video Industry, in Video Media Competition: Regulation, Economics, and Technology at 250-255 (Noam ed. 1985).

95 Sixty one percent in January-April 1990, down from 65 percent a year earlier. The viewing data are from Cabletelevision Advertising Bureau, "Advertiser Alert: Basic Cable Leads in Average Ratings Delivery January '90-April '90 Year to Date" (undated). The analysis is based on Nielsen data and, because the reported figures do not distinguish between local and distant independents, the actual viewing share for local signals is lower than 61 percent. Nevertheless, the fact that, in cable television households, the viewing share for local signals is large suggests that availability of a significant number of over-the-air signals, particularly in conjunction with certain other factors, may be sufficient to constrain a local cable system's market power.

this standard, radio, the print media, movie and legitimate theater, live events, and other alternatives belong in the market. While these media and activities provide substitutes for some services provided by cable, the magnitude of their impact appears to be too small to justify including them in our market power analysis.

4. Statistical Evidence of Cable Market Power

54. The record in this proceeding and in MM Docket No. 90-4 (the "Effective Competition" proceeding)[96] includes two types of statistical evidence on the issue of market power -- q ratio calculations and regression analyses that relate broadcast signal availability to basic rates and other relevant parameters.[97] These categories of evidence are discussed in the following paragraphs.

55. The q ratio. The q ratio is defined as the ratio of the market value of a firm to the replacement cost of its assets.[98] Industry-wide or economy-wide q ratios can also be calculated. While the q ratio was originally developed as a tool to analyze investment decisions, it has also been employed as a measure of market power. Although there are some conceptual and important measurement problems associated with applying the q ratio, it is recognized as a useful indicator of market power.

56. The q ratio is designed so that in competitive industries, the q ratio will be equal to or close to 1.0. In other words, the market value of

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96 See Notice of Proposed Rule Making in MM Docket No. 90-4, 5 FCC Rcd 259 (1990). In that Notice, the Commission tentatively concluded that changed circumstances in the video marketplace made it necessary to review the "three broadcast signal" standard for determining if cable systems are subject to "effective competition." The Cable Act exempted from rate regulation cable systems subject to effective competition and directed the Commission to establish the standard by which the presence of effective competition would be determined.

97 Data on post-deregulation changes in basic cable rates are discussed in Section II-A. The record shows that basic cable rates have increased substantially since deregulation, but, on a per-channel basis, the increases have been modest. Moreover, conclusions regarding market power cannot be drawn based on price changes alone; data on cost changes are also needed. However, the Commission lacks such cost data.

98 A more complete explanation of our use of the q ratio in analyzing the cable industry is set forth in Appendix E. Appendix E discusses the calculation of the q ratio, measurement problems, and other limitations in using the ratio.

assets should be equal or close to their replacement cost. If the q ratio is greater than 1.0 (i.e., if the market value is greater than the replacement cost), someone could find it profitable to enter the market, driving the q ratio back to 1.0. If there are barriers to entry, however, the firm or firms already in existence will continue to earn economic profits and the q ratio will remain above 1.0.[99] The q ratio may also remain above 1.0 if the incumbent firm controls a scarce resource, such as a license to use the radio spectrum.[100]

57. Some commenters have suggested that the q ratio for cable television systems ranges from approximately 3.3 to 4.3. For example, in the q ratio analysis submitted by Paul MacAvoy, the cable industry q ratio is calculated at 3.3 as of February 28, 1990.[101] MacAvoy's "best estimate" of q for the cable television industry as of September 30, 1989 is 4.3.[102] These calculations suggest that cable television systems are currently valued in the marketplace at three to four times the replacement cost of their assets.

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99 In the present context, "economic profits" include monopsony profits that cable operators may earn by virtue of any market power they might possess in the program acquisition market. When sellers of a product or service face only one possible buyer, the buyer is said to have monopsony power. In its review of the q ratio studies submitted in the cable inquiry, the United States Department of Justice ("Department of Justice") concludes that there is little evidence of monopsony power, so that any cable market power revealed by the q ratio analyses is attributable to cable's local distribution position. See Reply Comments of the Department of Justice at 21.

100 But see infra para. 59.

101 See Attachment to Reply Comments of United States Telephone Association ("USTA") (MacAvoy, "Reply to Comments Filed by the National Cable Television Association and Adelphia Communications Corporation, et al.") ("MacAvoy Reply Statement").

102 This estimate is based on a calculated market value per subscriber of $1698 and a replacement cost of tangible assets of $395 per subscriber. See Appendix 5 of Comments of USTA (MacAvoy, "Tobin's q and the Cable Industry's Market Power") ("MacAvoy Statement"). In addition to his preferred value of 4.3, MacAvoy presents three other estimates, based on alternative assumptions that he considers less satisfactory than those used for the preferred value. The other estimates are: 2.68, 4.56, 6.20. As explained in Appendix E, the alternative assumptions include basing replacement cost on engineering models of cable construction costs rather than adjusted book value of tangible assets and basing market value on recent selling prices of cable systems rather than on the aggregate value of their equity and debt.

58. In order to test for the possibility that the level of stock prices (used to calculate market value per subscriber) was influenced by some economy-wide phenomenon at the time these calculations were made, MacAvoy also computes the q ratio for all nonfinancial corporations. That ratio is 0.89 as of September 30, 1989 and 0.85 as of February 28, 1990.[103] Based on these figures, MacAvoy rules out the possibility that the calculated cable q ratios are high because of stock price fluctuations caused by developments in the economy at large.

59. The computation of both the numerator and denominator of the cable television q ratio, and the computation of the economywide q ratio are all subject to criticism. The most comprehensive critique of the q ratio is provided by the Department of Justice. The Department of Justice points out that the q ratio is an upper bound indicator of monopoly power, because it also reflects any monopsony power possessed by the firm or industry in question, and notes that the q ratio can remain above 1.0 in industries subject to above average risk or in industries in which firms own a scarce resource. Moreover, the Department of Justice cautions that, in some industries, certain intangible assets as well as tangible ones must be included in the replacement cost estimates. These points are discussed in more detail in Appendix E. After considering them all, the Department of Justice suggests that:

> given the magnitude of the q ratios, and the likely size of any corrections that should be made to them, it is likely that the q ratios for cable firms are greater than should be expected in industries subject to effective competition. Therefore, these studies provide some support for the conclusion that cable firms posess some degree of local market power.[104]

60. Regression Analyses. The record in this proceeding and in MM Docket No. 90-4 contains four studies examining the effect of broadcast signal availability on cable rates and one study of the impact of signal availability on market value per subscriber of cable systems.[105] These five studies, all of

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103 See MacAvoy Statement at 30-32 and MacAvoy Reply Statement at 37-38. MacAvoy also calculated q ratios for broadcast companies and for the seven Regional Bell Operating Companies and GTE. See Appendix E at para. 10. As explained therein, because these firms control scarce spectrum or are subject to rate regulation, comparison of their q ratios with cable q ratios are of little analytical importance.

104 See Reply Comments of Department of Justice at 23.

105 See Appendix A of Comments of National Telecommunications and

which employ the statistical technique of regression analysis, are discussed in some detail in Appendix E. Three of the four cable rate studies demonstrate a statistically significant inverse relationship between basic rates and the number of broadcast signals available.[106] The fourth study, which examines the change in basic cable rates from 1986 to 1988, finds no relationship. However, that study suffers from methodological deficiencies not present in the other three.[107] The fifth study finds an inverse relationship between market value per subscriber and the number of broadcast signals available. The Dertouzos and Wildman Study and the MacAvoy Reply Statement attempt to derive the precise number of broadcast signals required to constrain cable rates to competitive levels, but we cannot rely on these conclusions.[108] The other studies make no such attempt.

61. The NTIA Staff Report estimates the price per basic channel as a function of the number of broadcast signals available in the market and other variables. It examines the separate effects of increasingly greater numbers of broadcast signals, with results for 4 through 11 signals, and then for greater than 11 signals. The NTIA Staff Report finds that cable rates decline continuously as the number of broadcast signals increases.

Information Administration ("NTIA") in MM Docket No. 90-4 (Staff Report, "Competitive Effects of Broadcast Signals on the Price of Basic Service") ("NTIA Staff Report"); Attachment 1 to Comments of TCI in MM Docket No. 90-4 (Crandall, "Regulation, Competition and Cable Performance") ("Crandall Cable Performance Study"); Attachment to Comments of NCTA in MM Docket Nos. 89-600 and 90-4 (Dertouzos and Wildman, "Competitive Effects of Broadcast Signals on Cable") ("Dertouzos and Wildman Study"); Attachment to Comments of NAB in MM Docket No. 90-4 (Ducey and McLean, "The Impact of Off-the-Air Signals on Cable Pricing") ("Ducey and McLean Study"). For the market value per subscriber study, see MacAvoy Reply Statement.

106 In addition to "demand side" factors, such as the availability of substitutes, cable rates are affected by "supply side" factors, i.e., costs. Good cost data are not generally available. Nevertheless, it is worth noting that areas with many broadcast signals are also frequently served by relatively high-capacity cable systems. Such systems may realize economies of scale and scope that allow them to offer service at lower cost. Among other factors, high-capacity systems can earn revenue and recover costs from a wider than average range of sources, including multiple pay channels, pay-per-view events, and the scale of a greater complement of local advertising availabilities. Other things equal, prices will be lower on cable systems with lower costs.

107 See Appendix E, paras. 27-29.

108 See Appendix E, paras. 26 and 30 for a discussion.

62. The Crandall Cable Performance Study seeks to explain basic cable rates as a function of the number of broadcast signals available in the market, the number of basic cable networks carried, and other factors. It finds that basic cable rates decline as the number of broadcast signals increases, but, after a threshhold of five signals has been reached, the effect is no longer statistically significant.

63. The Dertouzos and Wildman Study relates the basic cable price per channel to broadcast signal availability and other factors. It finds that availability of five signals, and also of more than six channels, has a significant negative effect on rates. The study claims that the maximum effect on cable rates occurs at five signals.[109]

64. The Ducey and McLean Study seeks to explain the change in basic rates by the number of off-the-air signals available in the cable service area in 1988. No statistically significant relationship is found.[110]

65. Finally, the MacAvoy Reply Statement finds that broadcast signal availability has a statistically significant negative effect on market value per subscriber but the magnitude is small.[111]

66. In sum, while none of these studies satisfactorily indicates the point at which broadcast signals reduce cable rates to the fully competitive

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109 The Dertouzos and Wildman Study relies on another work, not in the record, to deduce that the availability of five broadcast signals is sufficient to constrain cable rates to competitive levels. That inference is critiqued and rejected in Appendix E at para. 26. The statistical results presented, do not support such an inference, since the study does not report on the separate effects of greater numbers of channels (i.e., 7, 8, 9, 10, or more).

110 Because this study does not control for other relevant variables, because it suffers from other defects, and because the other three studies all document a statistically significant relationship between cable rates and signal availability, we are inclined to discount the Ducey and McLean Study. For a more detailed critique of this study, see Appendix E, paras. 27-29.

111 This study also reports a calculation that roughly 60 broadcast signals would be needed to reduce cable system market values per subscriber to the competitive level. However, the assumptions utilized to derive that number are subject to some criticism, so we view it sceptically. For a critique of the 60 signals calculation, see Appendix E, para. 30.

level, the regression analyses we have reviewed lead us to conclude that broadcast signal availability can be a significant constraint on basic cable rates.

5. Other Evidence

67. Information on current basic cable rates in markets served by more than one competing cable system is available, both in the record and from FCC staff research.[112] These sources indicate that, where cable systems compete head-to-head, per channel rates for basic service are generally significantly lower than the national average. For example, the average per channel price for the sample of cable systems listed in Appendix H is 38.2 cents as of May 1990, while the December 31, 1989 national per channel average was 58.0 cents. The national figure is 52 percent higher. What is not clear, however, is whether the prices in markets with rival cable systems are equilibrium rates.[113]

68. Other anecdotal evidence offered in the record on cable market power includes allegations regarding: poor service quality coupled with rising subscribership; cable operator pressure on programmers to withhold or impede access of rival delivery medium to their services; and suggestions that cable MSOs can extract excessive concessions from programmers in exchange for channel space on their cable systems. The first allegation is discussed in Sections II-B and V-B, but cannot be quantified in a way that allows it to be meaningfully related to market power. The second and third allegations are discussed in Section IV below.

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112 See Appendix H for information based on a telephone survey by FCC staff, and on data from the record and from the Television & Cable Factbook. See also Hazlett, Duopolistic Competition in Cable Television: Implications for Public Policy, 7 Yale J. on Regulation 65, 90 (Winter 1990); Hazlett, Competition v. Franchise Monopoly in Cable Television, IV Contemporary Policy Issues 80 (1986). Additional data are available in Consumer Research 10 (May 1990).

113 If they reflect "predatory pricing" on the part of existing cable operators to prevent competition, as second entrants sometimes claim, then such rates are unlikely to be sustainable. Moreover, if existing operators are willing to absorb short-run losses to drive out (or create the opportunity to buy out) entrants, it suggests that incumbents may have created barriers to entry into the cable business. Such barriers are an indication of market power. See Testimony of Harry P. Cushing, III, President and CEO of Telesat Cablevision, Inc., ("Telesat"), FCC Orlando Cable Field Hearing (March 2, 1990); see also Comments of Telesat at 20-26; Reply Comments of Telesat at 5; and Letter from Gregory Schmidt, Counsel to Telesat, to The Honorable Alfred C. Sikes, Chairman, FCC (July 17, 1990).

6. Conclusion

69. A careful examination of the characteristics of cable service and the characteristics and availability of rival distribution media suggests that cable systems do possess varying degrees of market power in local distribution. The video marketplace continues to be a highly dynamic sector in the midst of transition. Cable television service consists of a unique cluster of services comprised of retransmitted broadcast signals, premium programming, broadcast-like basic cable services, and specialized basic cable network services such as ESPN, CNN, MTV, and BET. Local broadcasters provide varying degrees of competition to cable's retransmission function, and, to a certain extent, to the more broadcast-like basic cable services. Also, video cassette rentals provide significant competition to premium movie services. Although broadcast stations offer some degree of the specialized programming provided by the specialized basic cable network services, they do not provide it full-time. Generally, there is no close substitute for that steadily-expanding complement of specialized program services offered by the typical cable system at this time.

70. Our conclusion regarding cable market power is supported by the q ratio analysis. While the exact magnitude of the cable industry q ratio cannot be pinpointed precisely, the record shows that it is high enough to indicate the presence of some market power. The degree of market power differs from market to market, and the q analysis is not well suited for indicating with any precision the degree to which cable rates are above competitive levels. Because the q ratio is sensitive to the assumptions used in its calculation and to specific industry characteristics, it must be applied with caution. Post-deregulation increases in basic cable rates, in the absence of cost data with which to compare them, do not permit an inference regarding cable market power.

B. National and Regional Market Power Issues

1. Findings Regarding Horizontal Concentration

71. Although measuring horizontal concentration of control in the cable industry involves certain complexities and is thus subject to some debate, the record in this proceeding demonstrates a clear trend toward increased national concentration -- a trend that has accelerated since the enactment of the Cable Act. We agree with other federal agencies and the cable industry that this increased concentration has provided economies of scale and fostered program investment. However, this increase in concentration among companies that frequently enjoy monopoly franchises has also raised the question of whether MSOs (particularly the largest MSOs) have attained sufficient market power to extract unreasonable concessions from program suppliers and to unfairly restrain competition from alternative distribution services.

72. Concentration of control in the cable industry is based on the share of subscribers served by individual cable companies through their ownership or control of numerous local cable systems. Such concentration may be measured on a local, regional or national basis. On the local level, relatively few cable systems presently face competition from other multichannel video distributors for either programming or subscribers,[114] but they do compete directly with broadcast stations for programming, viewers and advertising revenues.[115] Cable operators also participate in regional and national markets for the creation and distribution of video programming, competing with other cable operators (including MSOs), broadcast networks and stations, and other distributors of video product. A system's ability to compete in these regional and national programming markets is obviously enhanced to the extent it is affiliated with an MSO, which is able to distribute a supplier's programming to significant numbers of subscribers. Horizontal concentration not only enables cable operators to share with program producers information about the tastes and reactions to programs of a wider base of viewers, thus helping to assure a closer match between those tastes and the programs those producers create; it also permits those operators to take advantage of valuable economies of scale.[116]

73. Data developed in this proceeding reveal that, overall, national concentration in the cable industry has increased significantly since the Cable Act was passed. For example, as shown by the tables in Appendix G,[117]

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114 See Section III-A, supra.

115 See, e.g., Comments of NAB at 19.

116 For a more extensive discussion of the benefits of horizontal concentration, see infra Section III-B-3.

117 The first three tables in Appendix G assess the level of national horizontal concentration in the cable television industry. (It was not possible to compile data on regional concentration of control.) Table I presents statistics based on the most recent data showing the number of subscribers to cable systems operated by each of the ten largest MSOs as a percent of subscribers to all systems of the 50 largest system owners ("top 50 subscribers"). The subscribers to each of the ten largest MSOs are also shown as a percent of the total of all cable subscribers. In addition, Table I provides the current cumulative shares for the top 4, 8, 10, 25 and 50 largest companies based on (a) the number of subscribers to cable systems owned by the 50 largest MSOs, and (b) the total number of cable subscribers. Tables II and III are intended to compare these statistics with the comparable values for earlier years. Table II compares the share of top 50 subscribers served by the top company and top 4, 8, 10 and 25 MSOs for selected years. Table III compares the largest company and top 4, 8, 10, 25 and 50 companies' shares of subscribers, expressed as a percent of all cable subscribers for selected

TCI, the country's largest MSO, has doubled in size since 1984, and now serves nearly 12 million subscribers, or 22.16 percent of all cable subscribers.[118] The second largest company, Time Warner, currently serves another 6 million subscribers, or 11.58 percent of all cable subscribers.[119] Combined, these two MSOs alone serve almost 34 percent of all subscribers nationwide.[120]

74. The concentration of subscribers served by the top four cable companies also has increased by more than 60 percent since 1984, rising from 34.3 percent to 52.3 percent.[121] Similarly, the share of subscribers served by the top 10 MSOs has grown substantially from 41.3 percent in 1984 to 61.8 percent this year.[122] Thus, at present, the top ten cable companies serve 32.9 million of the nation's 53 million cable subscribers.

75. Commenters representing cable interests point out that, according to traditional antitrust analyses, the cable industry is relatively unconcentrated and horizontal concentration therefore is not a problem requiring any Commission action at this time. Using basic subscriber numbers to estimate market shares, these commenters find that the Herfindahl-Hirschman Index (HHI)[123] for the cable industry is between 458 and 800, depending on the sources used for data -- well below the 1000 figure used by the Department of Justice to determine that an industry is concentrated. Significantly, the Department of Justice agrees that if it is appropriate to

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years.

118 See Appendix G, Table I. TCI's share of subscribers as a percent of the top 50 MSOs increased from 10.7 percent in 1984 to 24.7 percent in 1990. Id. at Table II.

119 See id. at Table I.

120 See id.

121 See id. at Table II.

122 See id. at Table III.

123 Most commenters framed their analysis of concentration in terms of the HHI. The Department of Justice generally uses the HHI when reviewing proposed mergers. Under the Justice 1984 Merger Guidelines, and HHI below 1000 indicates a relatively unconcentrated industry. The Department of Justice is likely to challenge a merger if it produces an HHI above 1000 and increases the pre-merger index by more than 100 points. The HHI for an industry is determined by squaring the market shares of each firm within the industry and adding the squares together.

analyze cable systems as a distinct national program acquisition market, then the cable industry is relatively unconcentrated from an antitrust perspective.

76. In light of growing concentration, however, we believe that the Commission should continue to monitor further horizontal concentration in the cable industry. Even where there is agreement that the industry is not excessively concentrated under prevailing antitrust standards, there is a belief that the steady increase in concentration in the last decade has brought the industry closer to the point at which any significant increase in concentration will likely attract antitrust scrutiny.[124] Furthermore, some cable networks operate on a regional rather than a national basis, and an MSO could be sufficiently concentrated to occupy an anticompetitive position at the regional level without possessing a large enough market share to disrupt the national market. Other commenters question whether an HHI that is measured at the national level is relevant because cable operators rarely compete against each other in individual markets.[125] These parties state that horizontal concentration is more appropriately measured at the local level, and that the Commission should be concerned over the fact that most cable systems do not face competition from other cable operators in their franchise areas. Indeed, it is our view that it is the present level of local -- not national -- concentration from which MSO's have primarily derived the ability to take anticompetitive action against programming services or competing multichannel providers. If we succeed in our present mission to enhance competition to cable in the local distribution market, then MSOs' ability to leverage local market power on an intermarket basis will be constrained, as well. Thus, we conclude that the current level of horizontal concentration in the cable industry is not sufficient to warrant regulatory intervention. However, the Commission intends to examine trends in horizontal concentration in the future.[126]

2. Findings Regarding Vertical Integration

77. At the same time that the cable industry has become more horizontally concentrated, it has become more vertically integrated,[127] with

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124 See Comments of NTIA at 48-53.

125 The commenters further note that, even by traditional measures, cable concentration at the local level exceeds the level of concentration enjoyed by broadcast stations, virtually all of whom have head-to-head competition from other broadcast stations within their service areas and are subject to various Commission ownership restraints.

126 See infra para. 91.

127 Vertical integration refers to common ownership of cable systems and program networks, channels or services.

many popular cable networks now having ownership links with one or more MSOs.[128] The record in this proceeding shows that the same MSOs that have grown horizontally since 1984 have also acquired more and more interests in cable programming services and networks. For example, TCI, the country's largest MSO, presently owns equity interests in 22 cable networks.[129] Time Warner, the second largest MSO, holds interests in 8 cable networks.[130] And Cox Cable, which ranks as the fifth largest MSO, has equity interests in 6 cable programming services.[131]

78. Overall, cable systems have equity interests in 13 of the top 20 national basic cable networks, and in 6 of the 8 national pay cable networks. The exact nature of the link varies considerably from network to network. For example, several programming networks have broadly based cable operator ownership participation, some are wholly owned by one or a few MSOs, and some networks have both MSOs and non-MSOs as part owners. This vertical integration has increased both the quality and quantity of program services available to the viewing public.[132]

79. It is apparent that vertical integration of the cable industry has accelerated since passage of the 1984 Cable Act. In fact, the Cable Act

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128 Tables in Appendix G show the patterns of vertical integration since 1975. More specifically, Table IV lists the national cable programming networks with at least some degree of cable operator ownership/equity, and indicates when the service began. Table V lists the national cable programming services with no cable operator ownership interest and states when they began service. Table VI is based upon recent data that presents the vertical interests of the major MSOs. This information shows the varied pattern of vertical ownership common in the cable industry. Table VII presents the vertical connection, if any, between the largest cable programming networks (in terms of subscribership) and MSOs. (Non-MSO ownership interests are not reported.) Table VIII presents the vertical connection, if any, between the most popular cable programming networks (in terms of ratings) and MSOs. (Again, non-MSO ownership interests are not listed.) Table XV in Appendix G contains data indicating that the number of vertical relationships has increased since deregulation.

129 See Appendix G at Table VI.

130 See id.

131 See id.

132 For a more extensive discussion of the benefits of vertical integration, see infra Section III-B-3.

presents somewhat of a line of demarcation in the vertical integration of the industry. In the years before passage of the Act, numerous independent cable channels (i.e., without MSO equity participation) began operation, and many of these continue to enjoy high subscribership. Data presented in this proceeding show that only thirty-eight percent (14 of 37) of the channels that pre-date passage of the Cable Act are vertically owned.[133]

80. Data for channels begun since passage of the Cable Act present a significantly different pattern. Sixty-four percent of cable channels launched since passage of the Cable Act (21 of 33) are vertically owned.[134] Furthermore, post-Cable Act channels which are vertically owned enjoy significantly higher subscribership (and correspondingly higher ratings) than new non-vertically owned channels. For example, Tables VII and VIII of Appendix G present subscribership and ratings data for the most popular cable channels. Only three post-Cable Act channels appear among the 15 channels with the highest subscribership and ratings; all three (TNT, The Discovery Channel and Nickelodeon) are vertically owned. In fact, FNN/Sports, the post-Cable Act independent programmer with the highest subscribership, has less than half of the subscribers of the vertically owned Discovery Channel.

81. This increase in vertically owned channels subsequent to the enactment of the Cable Act may be explained at least in part by the increasing difficulty encountered by new channels in gaining a niche in the steadily expanding universe of competing cable services. This is not to say, however, that only vertically owned programmers are successful. Some independent programming channels are among those with the highest subscribership. For example, the cable channel with the highest subscribership is independently owned ESPN. However, all of the independent channels with the highest subscribership and ratings were established -- in most cases well established -- before passage of the 1984 Cable Act.

3. Benefits of Horizontal Concentration and Vertical Integration

82. We agree with a number of commenters in this proceeding, including other federal agencies[135] and various cable interests, that horizontal

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133 Moreover, some of these 14 channels which currently are vertically integrated, including CNN, the Family Channel and WTBS, began as independently owned channels, and became vertically integrated only after passage of the Cable Act.

134 As noted at note 133, in addition to these 21 channels, since 1984 MSOs have acquired equity interests in at least three programming services that were independent before passage of the Act.

135 The government commenters are NTIA, The Department of Justice and the staff of the Bureau of Economics and the San Francisco Regional Office of the

concentration and vertical integration produces significant benefits for cable subscribers. Higher concentration levels in the cable industry have enabled companies to take advantage of valuable economies of scale and foster investment in more and better program sources, which lead to more investment in programming, more original programming and a wealth of new viewing options for consumers.

83. For example, on several occasions, MSO investment has enabled a programming service to remain in operation when it otherwise would have been forced to discontinue its programming. MSO commenters emphasize that the cable industry provided critical financial support to sustain both Turner Broadcasting (owner of WTBS and CNN) and C-SPAN.[136] In addition, NCTA quotes Discovery Channel Chairman John S. Hendricks' statement that cable operators' investment "rescue[d]" his programming service.[137] Another example is TCI's financial backing of Black Entertainment Television (BET), which BET's own president describes as being "most responsible for the fact that black Americans today have dedicated to their specific viewing interest a 24-hour cable television network."[138] Thus, vertical integration by MSOs with significant subscribership has contributed to program diversity by providing financial support for faltering program services.

84. Horizontal concentration and vertical integration can also promote the introduction of new services into the increasingly competitive programming services market. In addition to providing needed capital and a ready subscriber base for such services, cable operators can more easily share information with producers about viewer taste, reaction to programs and desire for new programs. Vertical integration also can help a cable company avoid transaction costs normally incurred in acquiring programming. Such costs include time, human resources, and money expended in negotiating and enforcing program contracts.

85. Vertical integration enables cable operators to improve the quality of existing program services. Cable systems have strong market incentives to make the program services they offer more attractive if they

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Federal Trade Commission ("FTC").

136 See Comments of Cablevision at 134; Coments of NCTA at 55.

137 Comments of NCTA at 55 (quoting Statement of John S. Hendricks before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation at 4 (June 21, 1989)).

138 Comments of NCTA at 56 (quoting Testimony of Robert L. Johnson before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation at 3-4 (June 21, 1989)).

believe market penetration will increase as a result.[139] In the absence of a vertical relationship, however, increased programming expenditures by one cable operator, which generally would result in better programming, could benefit unaffiliated system owners in other communities who, because of their position as the only local multichannel program provider can obtain and distribute this new programming relatively inexpensively, even though they have not contributed any initial investment to the creation of this programming. This would create a "free rider" situation, resulting in a decrease in overall expenditures that would otherwise be devoted to programming investments. Vertical integration between cable operators and program producers can help avoid the potential "free rider" problem.

86. Furthermore, vertically integrated cable systems will have little incentive to reduce program payments unreasonably to programmers that it owns, because these payments will ultimately return to the system. The result for the public is an increase in the quality and amount of programming that flows from an increase in revenue to the programmer.

4. Other Relevant Issues

87. In addition to distributing video programming on a local level, cable operators also sell advertising time, purchase and create programming and distribute such programming to other video providers. The advertising and programming markets clearly have regional and national dimensions, and commenters have raised concerns that cable's horizontal and vertical ownership patterns reflect an undue degree of market power on the regional and national levels.

88. We do not find that horizontal concentration or vertical integration gives cable systems market power in advertising markets. In the national advertising market, advertising is sold by the programmers, not by cable operators. While it is true that MSOs have interests in most (but not all) popular programming, all cable programming services reach far fewer homes than broadcast networks, providing a much smaller audience for advertisers. In local spot advertising markets, the competitiveness of the market depends on the number of local outlets, not upon the extent of the cable operator's national or regional ownership. It should be noted, however, that many advertisers are increasing their use of narrowcasting, which more defined audiences view more often.

89. Finally, some commenters assert that vertically integrated MSOs discriminate against services they do not own by denying carriage or offering carriage on inferior terms. Similarly, some commenters complain that

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139 Because most of cable operators' costs are fixed, revenues increase faster than costs as penetration increases for a given plant size.

vertically integrated cable systems discriminate against rival delivery media by denying or hindering access to cable-owned programming services. Some commenters state that the increasing size and concentration of MSOs may allow them to extract anticompetitive concessions from unaffiliated programming services, undermining the competitive environment on all market levels. These concerns will be addressed in Section IV-B regarding "Program Access".

5. Conclusions

90. As demonstrated above, horizontal concentration and vertical integration in the cable industry have increased significantly since enactment of the 1984 Cable Act. This has brought benefits in terms of efficiencies and program investment. Some commenters have identified concerns that can be associated with high levels of horizontal concentration and vertical integration.

91. The Commission concludes that the introduction of competition at the local level is the best way to cure any potential difficulties arising from horizontal concentration. As we have stressed throughout this Report, encouraging the development of multichannel competition to cable is our primary objective. As we will outline later in this Report, the Commission finds that carefully targeted, temporary measures can be employed to address particular program access problems associated with horizontal concentration and vertical integration. See infra para. 129-30. Such actions are warranted as an interim measure pending the realization of multichannel competition. In light of those proposals, we find it unnecessary to propose any specific structural limitations. If the Congress adopts the measures proposed in Recommendations 6 and 7 set forth in the Introduction to this Report, it should authorize and instruct the Commission to report to Congress within three years on the effect of such remedies in fostering competition in the video marketplace and whether direct limits on horizontal growth or vertical integration in the cable industry have become necessary.

IV. COMPETITIVE ANSWERS

92. Introduction. This Commission is convinced that the most effective method of promoting the interests of viewers or consumers is through the free play of competitive market forces. In the Notice, however, we indicated that it might be possible for vertically integrated MSOs to exert market power to prevent these forces from working in local, regional and national cable service and programming markets.[140] We have found and reported that cable systems do, in fact, possess varying degrees of market power in the local distribution of video programming. The following discussion in subsection A evaluates the prospects for competition in this local market.

93. The development of competition on the local level can be enhanced by taking certain steps to assure that cable's competitors are allowed limited temporary access to programming. These steps are more fully described in subsection B.

94. Subsection C examines an equally significant facet of the problem of local competition to cable: the franchise process. We have found that certain aspects of this process discourage the growth of competing cable systems and competing non-cable video distribution media. Accordingly, we make several recommendations for modifying the franchise process to increase the prospects for competition.

95. Subsection D examines the unique interdependency of broadcast and cable and the ways in which current regulations artificially and harmfully skew this relationship. This subsection also discusses measures that can make this relationship more competitive.

96. Subsection E examines another access concern: whether cable operators discourage the use of their "leased access" channels by unaffiliated programmers. Under the Cable Act, a cable operator must set aside a certain number of channels, depending on the size of the system, for commercial lease by unaffiliated programmers. It appears that these channels are underused, and we make certain recommendations to rectify this situation.

A. Prospects for Competition in the Local Distribution of Video Programming

97. In the Notice, we sought to determine whether there are viable competitors to local cable operators. In a few areas, direct competition is provided by a second competing cable system. In other areas, we stated that "[e]ven though there may be only one cable system in a given community, cable systems may face competition at the local level because subscribers have

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140 See Notice, 5 FCC Rcd at 363.

alternatives to cable service." Notice, 5 FCC Rcd at 365. In addition to the availability of a sufficient number of over-the-air television signals to act as a check on basic cable rates, we sought comment on the degree to which other sources of programming acted as partial substitutes for cable-delivered video services. Specifically, we discussed "wireless cable," home satellite receiving antennas (i.e., HSDs), SMATV and the sale and rental of pre-recorded video cassettes for use in VCRs. Wireless cable service is a multichannel terrestrial service delivered to homes over the air on channels specifically allocated for that purpose in the microwave frequency band. It offers the same type of cable network program services that traditional hardwired cable offers but generally has less channel capacity.[141] SMATV, sometimes referred to as "private cable," is a service provided in apartment buildings, condominiums, hotels, and similar multi-unit buildings, utilizing wire or cable to deliver throughout the building signals received on a satellite reception antenna and receiver.

1. Second Cable Systems

98. The number of directly competitive second cable systems is relatively small, with commenters reporting 40 to 49 directly competitive systems currently in operation.[142] Approximately two thirds of these systems have overlap areas of 50 percent or more. The relative paucity of successful competitive cable systems to date has been variously attributed to a lack of interest by cable operators (due to less attractive economics), to restrictive requirements by franchising authorities (e.g., universal service requirements), and to what has been called predatory activity by incumbents, as well as other advantages of incumbency. In those cases where second cable systems exist, the

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141 Wireless cable service can be provided via ten channels in the Multipoint Distribution Service ("MDS") and in MMDS, three channels in the Private Operational-Fixed Microwave Service ("OFS") and twenty channels in the Instructional Television Fixed Service ("ITFS"). The ITFS channels are primarily used for educational purposes and are available for wireless cable use only when an ITFS licensee is willing to lease time on its channels. Wireless cable usage of ITFS channels is also subject to certain time restrictions. See 47 C.F.R. § 74.931(e).

142 It appears that in the past local franchising authorities have rarely encouraged second competitive systems, and, where second systems have been authorized, it has been difficult for them to succeed. Commenters note that in a number of cases even when competing systems were authorized, second systems were never ultimately constructed. As of 1988, approximately twenty systems had not been constructed after authorization. While six competitive systems have failed completely, 30 such systems have been bought by or merged with the incumbent service provider.

direct competition has resulted in reduced per channel rates for cable service. See Appendix H.

99. Despite the apparent difficulties currently encountered in introducing competing cable systems to local markets, some commenters claim that there has been an increase in franchising authorities' interest in reducing barriers and authorizing competitive systems, and a recent increase in the initiation of new systems would appear to support this claim.[143] Moreover, several factors are likely to encourage the further increase in the number and extent of competitive cable systems. First, competitive systems may prove more viable if more cities modify restrictive franchise regulations and authorize second franchises as a way to resolve problems with existing exclusive operators. We can expect to see increasing interest in this approach, as the public and franchising authorities become increasingly aware of communities where second systems have proven viable and effective. Second, as the availability of attractive unwired markets declines, existing cable operators may become more interested in expanding into areas that are already served by another operator. Third, the recent dramatic increases in cable advertising revenues introduce a significant new revenue stream for cable operators, increasing the overall available income, and thus the potential support base for competing systems.

2. Wireless Cable

100. There are currently 50 or more wireless cable systems serving approximately 300,000 subscribers across the country, with numerous additional systems planned.[144] The Commission is currently in the process of updating and simplifying its rules governing the services that provide wireless cable

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143 Indeed, some state cable television associations appear threatened by this interest and have apparently been lobbying state and local governmental authorities to subject second systems to the same obligations that apply to existing operators.

144 This number is supplied by WCA, which also asserts that at least 24 new systems have begun operating in the last year alone. More systems can be anticipated. Time Warner cites the 1989 Television & Cable Factbook data showing that there were 216 outstanding construction permits, with an additional 360 lottery selectees identified, and 132 uncontested applications on file. The 1990 Television & Cable Factbook reports 161 outstanding construction permits. 58 Television & Cable Factbook, Cable & Services at B-87-96 (1990 ed.) The Commission's own records of April 20, 1990, showed 126 outstanding construction permits, 892 identified lottery selectees, and 1,293 pending uncontested applications on file.

channels. See Notice of Proposed Rulemaking and Notice of Inquiry in General Docket Nos. 90-54 and 80-113, 5 FCC Rcd 971 (1990).[145] Its expressed intent is to enhance the viability and competitive stature of wireless cable. Depending on the results of this proceeding, as well as other technological advances, wireless cable may well expand its channel capacity in the relatively near future to compete more effectively with cable in numerous communities, and eventually across the country.

101. There are two additional factors essential to the continued and successful development of wireless cable as a competitive alternative media. The first is the availability of programming. Wireless cable operators continue to contend that programming is often refused to them altogether or offered only at discriminatory prices or terms. Appended to its comments, NCTA has submitted a study by Dr. Benjamin Klein ("Klein Study") which disputes the contention that wireless cable operators are systematically discriminated against. The Klein Study concludes that over the past few years, more and more cable programming has been made available to wireless cable operators. Even taking that conclusion for granted, the record shows that programming is not available on the same terms and conditions to wireless cable operators as it is to traditional cable operators.[146] The justifications offered for such disparate treatment, the benefits of program exclusivity, and the proposed regulatory response are discussed below in Section IV-B.

102. The other significant factor affecting wireless cable growth is the impediment presented by a variety of local regulations. One impediment is the effort by some local authorities to expand the definition of "cable system." Although the Commission determined in 1978 that wireless cable systems were exempt from local franchising requirements, the issue was reopened in MM Docket No. 89-35, in which we initiated an inquiry into whether Congress intended wireless cable to be included within the definition of "cable system," and thus be required to secure local franchises.[147] A second regulatory impediment is

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145 In that proceeding, the Commission is also investigating the technological and economical practicality of the Comband transmission system, which delivers two complete program signals on each alloted channel, thereby at least doubling a wireless cable system's "channel" capacity.

146 The Klein Study does not address the severe geographic restrictions that attach to the carriage of many such programs, the frequently delayed availabilities, and the discriminatory pricing practices and different contractual terms with which alternative distribution media -- unlike cable operators -- must comply. Consequently, we cannot conclude that the cost of providing service or concerns over either the creditworthiness of alternative media or the security of their signals justify such disparate treatment.

147 See Notice of Proposed Rule Making in MM Docket No. 89-35, 4 FCC Rcd 2088 (1989).

local land use regulation, which in many localities has appeared to discriminate against wireless cable reception antennas. Third, "mandatory access" laws exist in thirteen states and the District of Columbia. These laws provide franchised cable operators, but generally not other multichannel video providers, with mandatory access to buildings. Even in some jurisdictions without mandatory access laws, local authorities achieve the same result by interpreting Section 621 of the 1984 Cable Act (47 U.S.C. § 541), which provides franchised cable operators with access to "dedicated easements," to apply to private easements. In this way, franchised cable operators are granted access to all buildings in which an internal cable system has been provided to tenants or cooperative owners. These local regulation issues are more fully addressed below in connection with the local franchise process.

3. Service to Home Satellite Dish Owners

103. HSD use in the United States has grown from approximately 900,000 units in use in 1984 to roughly 2.8 million units in use today. An initial rapid growth of HSD sales was stalled in 1986 by the advent of satellite signal scrambling. Prior to that, however, HSD sales had reached a rate of almost three quarters of a million per year, growing five-fold in a three-year period. With the near universal availablility of descramblers (a development of the last several years), along with the growth of satellite program distributors, sales rates have again begun to rise modestly since 1988, but there has not been sufficient experience to project a growth rate with certainty.[148] While the number of HSD owners is small relative to the number of cable subscribers, it is argued that HSD ownership is an effective alternative to cable service in terms of programming choice. According to one commenter, more programming is available to HSD users than to cable subscribers.[149] Nonetheless, even if a

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148 According to figures submitted by the Satellite Broadcasting and Communications Association of America ("SBCA"), monthly sales in the last half of 1989 and in 1990 (25,000 to 45,000 units per month) have been higher than in 1988 and early 1989 (15,000 to 40,000 units per month), but the monthly changes have been erratic. Sales remain well below the pre-scrambling levels.

149 There are approximately 70 unscrambled video program signals available. SBCA claims that all scrambled signals are available to HSD owners, and this commenter provides data appearing to verify this claim, although some signals are available only from certain distributors and perhaps in certain packages. See Comments of SBCA at 2 and at Exhibits B and C. While the National Rural Telecommunication Cooperative ("NRTC") specifically recounts, in its reply comments, its unsuccessful efforts to secure seven program channels at any price, those channels are carried by various other satellite distributors and thus are not being withheld from home reception.

variety of programming is available to the HSD industry at "just and reasonable" prices, as some claim, such service is considerably more expensive for HSD subscribers than cable service and requires reception equipment generally costing $2000 - $3000.[150] In addition to the high cost of HSD reception equipment, zoning regulations or physical limitations so restrict many viewers that they cannot install HSDs at any price.

4. Direct Broadcast Satellite Service

104. While DBS service will not be available in the immediate future, it does appear to be attracting the investor interest necessary to launch the service in the next three to five years. If and when DBS becomes a reality, it could readily compete with cable. Some single operators plan to offer close to thirty channels and are likely eventually to offer over one hundred channels.[151] Construction costs (satellite construction, launch, positioning and insurance) for these systems should be in the range of $300 - 500 million for the satellite capacity and $300 - 500 per subscriber for reception equipment; this compares quite favorably with the per subscriber cost for cable installations or system purchases.[152] It is thus likely that if DBS service

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150 Monthly fees for premium programming considerably exceed the fees typically charged by cable systems for the same programming. According to NRTC, satellite program distributors pay an average of 460 percent more for premium cable programming than small cable systems. NRTC supports its claim with specific program price figures submitted with its reply comments. The Commission has recently requested information regarding the pricing of superstation and network station signals from satellite distributors and cable system operators. See Further Notice of Inquiry in Gen. Docket No. 89-88, FCC 90-196 (released June 21, 1990), 55 Fed. Reg. 27478 (July 3, 1990).

151 All DBS permittees currently are assigned from eight to twenty-seven pairs of DBS channels, with each pair of channels (i.e., one channel at each of two orbital locations) capable of delivering one channel of service to the entire country. The permittees have the capability of combining facilities, and a third party lessee could lease transponder capacity from multiple DBS operators to offer a system with even more channels. Moreover, at least one DBS entity has stated its expectation to put four distinct complete video signals on each DBS channel, using a digital signal compression transmission technique, so that it could deliver 108 signals on its currently authorized twenty-seven channel system.

152 For cable systems, per subscriber costs for installation, plant and facilities are estimated by various parties to be in the $400 - $750 range, depending on the system. See, e.g., Appendix E at 3, 6 n.11. While the DBS construction costs do not represent the total investment required to initiate service, the additional start-up and operating expenses would be similar to those necessary for a cable system or other multichannel video delivery

becomes available in the United States, it will have the capacity to compete effectively with cable service, provided it is able to secure adequate programming. Such systems are, however, at least three years away from the completion of construction and launch.

105. Commenters have also raised another significant issue regarding DBS: whether cable ownership or involvement with DBS systems should be prohibited or constrained. A number of large MSOs have announced that they plan to provide or participate in the provision of DBS service.[153] All parties in such ventures, including the DBS entities that would hold the licenses, have publicized an intention not to compete directly with local cable systems, but rather to use the local cable systems as their distribution arm to effectively increase the system capacity of local cable systems. Such operations obviously would diminish or eliminate the competitive aspects of DBS. On the other hand, it is arguable that the entry of cable interests in this industry, with their financial resources, marketing experience and programming resources, could present the best opportunity for the advancement of DBS, which promises significant benefits beyond the possibility of direct competition to cable. Despite some concerns about the competitive effects of cable involvement with DBS, we therefore do not favor limiting cable participation at this time. Cable participants in DBS should have considerable incentive to use that medium to compete vigorously with other cable operators on a scale that would be otherwise unattainable. Nonetheless, developing relationships between cable and DBS should be monitored.

5. Satellite Master Antenna Television Systems

106. In 1989, SMATV operators collectively served about a half million subscribers, down from a high of one million in 1987. The National Private Cable Association ("NPCA") claims a potential market for SMATV operators of 17 to 22 million subscribers, and SMATV operators generally claim that their service is valuable not only in providing a competitive alternative to a large,

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system, although additional economies may exist for DBS systems.

153 One DBS entity, TEMPO Satellite, Inc., is a subsidiary of TCI, the largest cable MSO in the United States. Another, Hughes Communications Galaxy, Inc., has recently announced that it is to become a member of a consortium, called SkyCable, which will also include a major cable company and a national broadcast network. According to published reports, another consortium composed entirely of cable MSOs (including TCI) -- K Prime Partners -- has been or is being formed to deliver a package of programming direct to homes, first on FSS satellites, and later on DBS satellites when they become available. SkyCable and K Prime apparently intend to lease transponder capacity and may directly finance the building of DBS satellites.

albeit limited, number of subscribers, but also in providing "benchmark competition" to the benefit of the public beyond the reach of their systems.[154]

107. The several SMATV operators who filed comments contend that a variety of local regulations and practices have severely restricted their ability to operate and to compete, to their detriment and to the detriment of their subscribers and the general public. These regulatory issues are more fully discussed below in Section IV-D. The only regulatory impediment to SMATV service erected by Commission rules or regulations affects systems which attempt to expand their service beyond commonly owned facilities separated by a public right-of-way. This issue will soon be addressed in a Report and Order in MM Docket No. 89-35, regarding the definition of cable systems.

6. Local Exchange Carriers

108. As we stated in the Notice, local telephone companies are seeking relief from statutory and regulatory restrictions which generally preclude them from providing video programming in their service areas. The advisability of maintaining, modifying or repealing such prohibitions are the subject of a separate proceeding, and we expect to report our analysis thereof to the Congress in due course. Among the subjects we will be considering in that proceeding are: the adequacy and availability of safeguards against anticompetitive conduct; the impact of entry on the development of new telecommunications services; its impact on the modernization and competitiveneness of the nation's telecommunications infrastructure; and terms of the Modification of Final Judgment ("MFJ") that broke up AT&T and imposed line-of-business restrictions on the Bell Operating Companies. Under any scenario, substantial telephone company participation in the video marketplace is unlikely to occur in the near term and, consequently, does not play a role in our analysis.

7. Video Cassette Recorders

109. VCR penetration has grown dramatically during the past few years. In 1990, VCR penetration reached 72 percent,[155] up from 30 percent in 1986.[156] It

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154 According to this argument, the rates that cable operators charge in the limited instances where they compete directly with a SMATV operator give a clear indication of the competitive rate for their service. This is of little consequence to subscribers outside the reach of the SMATV systems, however, in the absence of a requirement that the cable company charge a uniform rate throughout its franchise area.

155 Arbitron, "May 1990 VCR Penetration Estimates" (June 1990).

156 Testimony of Jack Valenti, President and CEO, Motion Picture Association of America, Inc., Hearings before the Judiciary Committee, United States

is expected to grow another 9 percent by 1993.[157] Indeed, cassette rentals and sales produced combined revenues in excess of basic cable service revenues nationwide.[158]

110. The widespread availability of VCRs allows viewers to see over-the-air programs at times other than when they are broadcast and allows viewers to choose pre-recorded tapes on a variety of subjects that, with the exception of sports programming, cannot be matched even by the cable medium. High VCR penetration levels and video cassette rentals combined with broadcast or another over-the-air video program delivery system offers an alternative that, at least to some degree acts as a partial substitute to cable services.

8. Conclusion

111. Competition from alternative multichannel providers such as second competitive cable systems, wireless cable systems, SMATV systems, and DBS service, while limited at present, is emerging. Indeed, if provided reasonable access to cable programming services, wireless cable, second competitive cable systems and SMATV operators have the potential to provide significant competition to cable. In addition, DBS has the potential, in our judgment, to become a strong competitor by the mid-1990s if recently announced plans go forward and DBS can obtain reasonable access to programming.

Senate, at 10 (October 23, 1986).

157 Reply Comments of Time Warner in MM Docket No. 90-4, at 29.

158 Paul Kagan Associates, Inc., The Kagan Media Index at 2 (March 14, 1989).

B. Programming Access and the Competitive Process

112. We have indicated that there may be several obstacles to the development of competition to cable systems on the local level. A major component of the ability to compete with cable systems is the ability to secure programming. Ensuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable. In addition, ensuring program suppliers fair and equitable access to carriage on cable systems or other multichannel program distributors is necessary to encourage development of new programming and thus enhance the diversity of available program services for consumers.

1. Evidence of Program Access Problems

113. While there clearly has been substantial and beneficial growth in the provision of cable services as a result of vertical integration and horizontal concentration, the record in this proceeding contains substantial evidence of specific problems concerning program access. First, the record shows that vertically integrated cable operators often have the ability to deny alternative multichannel video providers access to their vertically owned programming services. If permitted to continue, this practice could jeopardize the viability of new competition to cable. Second, the record shows that program services, particularly new program services, have sometimes experienced difficulty obtaining access to cable carriage. In addition, some vertically integrated MSOs have the ability to limit competition to vertically owned services. Such activities restrict the reach of the excluded service, especially where the cable operator's market share is relatively large on a regional or national basis. Moreover, discriminatory program practices serve to limit diversity of subscriber viewing choices.

114. Alternative distribution media's access to cable programming. Alternative distribution media operators have presented evidence that some cable programmers have either refused outright to sell cable programming to them, or have imposed discriminatory terms and conditions in their programming licenses that have seriously handicapped the alternative media's ability to compete effectively against incumbent cable systems. In particular, competitive media providers have made the following complaints:[159]

(a) Some programming services refuse to make their programming available to wireless cable providers, even in areas unserved by cable. Turner Broadcasting Systems ("TBS") admits that "TNT is

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159 The cable industry's and other commenters' response to these complaints will be discussed below. See, e.g., infra paras. 115-17.

not available to MMDS," and that "[o]nly cable systems and TBS are eligible to be distributors of TNT."[160] TBS also confirms that TNT is not available to cable overbuilders. TNT states that it elected to deal only with cable operators because it believes that "the value of the additional distribution [to cable competitors] was outweighed by the value to TNT of providing cable operators the incentive of additional exclusivity."[161] Other commenters note, however, that, at least in some cases, TNT is not offered on an exclusive basis to cable systems.[162]

(b) Wireless cable operators complain that most programming services made available to them are sold only at a significantly higher per-subscriber rate than is charged to existing cable operators purchasing the same service. For example, while the top cable rate for CNN is $.28/subscriber, the top wireless cable rate is $.50/subscriber.[163] The top cable rate for USA Network is $.23/ subscriber, in contrast to the top wireless rate of $.38/ subscriber.[164] Similarly, while the Nashville Network charges cable operators a top rate of $.20/subscriber, it charges wireless cable a top rate of $.35/subscriber.[165] Cross Country Cable, Inc. asserts that, for 17 basic programming services available to both wireless cable and cable MSOs, the price charged to wireless cable is as much as 200 percent higher.[166]

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160 Exhibit 1 of Reply Comments of TBS.

161 Id.

162 See Letter from Edward P. Taptich, Counsel to Pacific West Cable Television, to Robert L. Pettit, General Counsel, FCC, at 3 (April 18, 1990).

163 See Appendix G, Table XI.

164 Id.

165 Id.

166 See Letter from George Ring, Chairman and CEO of Cross Country Cable, Inc., to The Honorable Alfred C. Sikes, Chairman, FCC, at 4-5 (April 4, 1990). Mr. Ring also comments on the difficulties his company has experienced in attempting to secure programming rights for its wireless cable system, and notes that his prior dealings with the same program services had been far more favorable when he was purchasing programming rights for cable services. Id. at 1-2.

(c) Wireless cable operators also complain of discriminatory terms and conditions imposed upon their acquisition of various program services, making it difficult for them to engage in head-to-head competition with local cable systems. For example, WCA submits that even when programming is made available to wireless services, its distribution is often limited geographically in order to prevent competition with wired systems. According to WCA, a number of ESPN contracts prohibit wireless cable operators from distributing ESPN to "any location which is located in any portion of an area which is any part of the franchise area of an ESPN cable television affiliate."[167] ESPN counters that it has imposed geographic restrictions on MMDS operators after weighing a number of factors, including its "distribution pattern, the ability of a market to support additional efficient distributors, the attractiveness of [its] programming, [its] marketing efforts and, importantly, incentives for local promotion."[168] Similarly, WCA reports that the contract between People's Choice TV (PCTV) and SportsChannel Chicago Associates (SCCA) restricts PCTV from distributing SCCA programming outside of Cook County, Illinois, even though PCTV's wireless cable system serves areas well beyond the county's boundaries. As a possible explanation for this limitation, WCA notes that SCCA's parent, Cablevision, owns and operates cable facilities outside of Cook County that are located within PCTV's wireless cable service area.[169]

WCA also submits evidence on another program contract provision which effectively protects cable systems from head-on competition with wireless program distribution services. WCA notes that Cablevision, a large cable MSO with equity interests in a number of programming services (including American Movie Classics, Bravo and CNBC) requires wireless cable operators to renegotiate their program affiliation agreements to impose area-wide marketing and distribution obligations on the operators once their penetration reaches 2 percent. Cablevision asserts that it requires this provision to protect against "free-rider" problems or "cherry-picking" by the wireless cable operator, who, it claims, may have economic incentives not to expand service into

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167 Letter from Paul J. Sinderbrand, Counsel for WCA, to Robert L. Pettit, General Counsel, FCC, at 1 (June 26, 1990) ("Sinderbrand Letter").

168 Reply Comments of ESPN at 3.

169 Sinderbrand Letter at 2.

less attractive neighborhoods.[170] WCA contends, however, that because of the technology they use, wireless systems have no such incentives and will provide service wherever an adequate signal can be found.[171] WCA thus concludes that the 2 percent provisions are in reality intended to cap wireless penetration, thereby inhibiting its growth and limiting the competition it provides to cable systems.

(d) SMATV operators complain of similar problems. NPCA, representing packagers of programming to SMATVs, complains that programming is often available to SMATV operators only through the local cable operator, which either refuses to provide access to the programming, offers programming at very high prices or offers programming subject to a time-delay requirement.[172] For example, SMATVs must purchase HBO (at a substantial mark-up) from cable operators serving the same area. Disparities in prices charged to cable and SMATV systems by program services are illustrated by the experiences of Mid-Atlantic Communications, Inc., a company that operates both cable systems and SMATV systems. As shown in Table XII to Appendix G, Cinemax is available to Mid-Atlantic's cable systems at $3.86/subscriber, but its SMATV systems must pay $6.50/subscriber. MTV is available to cable systems for $.17/subscriber, but SMATV operators must pay $.29/subscriber. SMATV systems must pay $.17/subscriber for FNN, while cable operators pay only $.055/subscriber.[173]

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170 See Letters from Marc Lustgarten, Vice Chairman, Cablevision, to The Honorable Alfred C. Sikes, Chairman, FCC (March 28, 1990 and May 24, 1990) ("March 28 Lustgarten Letter" and "May 24 Lustgarten Letter"). Cablevision requires wireless cable operators to bear certain costs of marketing its program service once their penetration rate exceeds 2 percent. In contrast, although imposed on some, these requirements are typically not required of franchised operators.

171 Sinderbrand Letter at 2-3 n.3.

172 Examples of these program access problems are summarized in Table IX in Appendix G. "Time delay," as used in this context, involves a programmer selling to a private cable operator only following an extended period (e.g., 90 days) after the franchised cable operator is replaced as the multichannel provider by the private cable operator. Comments of NPCA at 25.

173 See Appendix G, Table XII. Additional evidence of disparities in prices charged to cable and SMATV systems is presented by the National Satellite Programming Network, Inc., et al. ("NSPN").

(e) HSD owners have complained about similar experiences. NRTC, representing packagers of programming to owners of HSDs, alleges that most vertically integrated programmers refuse to deal with third parties who distribute programming to HSD subscribers. It should be noted, however, that the record indicates that all program networks are available to HSD owners either through program distributors or direct sales. HSD distributors complain, however, that they pay higher prices for the programming than even the smallest cable operators. NRTC provides examples of such price differentials, showing that in one case an HSD program distributor was charged $10/subscriber for an eighteen channel package, while the local cable operator was charged $2.25/subscriber for the same package.[174]

(f) Some second competitive cable systems have alleged similar program access difficulties. Telesat, an operator of second competitive systems in Florida, asserts that it has been denied access to some cable network programming. For example, Telesat filed suit against The Nashville Network for its refusal to renew Telesat's affiliation agreements in areas in which Telesat competes with another cable system.[175] Telesat also claims that it is denied access to the Sunshine Network, a regional sports network owned, in part, by MSOs that operate in Florida.[176]

(g) Small cable operators have complained that they also receive less favorable treatment from many cable programming services, even when they try to enhance their appeal to program suppliers by combining their program purchasing efforts. The National Cable Television Cooperative ("NCTC"), a cable cooperative formed to secure programming in bulk for small cable operators, claims that it has experienced significant difficulties purchasing programming from cable networks. According to NCTC, although it has reached agreement with some basic cable networks, none of the major pay networks (such as HBO, Cinemax and Showtime) has presented NCTC with master affiliation agreements, which are necessary, in NCTC's view, to offer its members the same benefits

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174 See Appendix G, Table IX, n.a.

175 See Telesat Cablevision, Inc. v. Opryland USA, Inc. d/b/a The Nashville Network, Case No. 90-137-Civ-Orl-19 (M.D. Fla., filed Feb. 28, 1990).

176 Sunshine Network was organized in 1988, and is 51 percent owned by eleven MSOs that operate in Florida, and 49 percent owned by Home Sports Entertainment, an affiliate of TCI and other MSOs.

and provisions a major MSO would receive.[177] NCTC states that the smaller cable operators it represents are usually offered program affiliation agreements that include only stock provisions, and that they do not benefit from unspecified "attractive features" included in side agreements that the MSOs enjoy.[178]

115. In response to these complaints by alternative distribution media, the cable industry and cable programmers state that program networks are available to competitive media. For example, NCTA's Klein Study finds that cable network programming is widely available to alternative media. We note that Klein does not, however, explain the different terms and conditions under which programming is licensed to alternative delivery media.

116. The cable industry and cable programmers also point out that there are several legitimate business reasons why programming is either unavailable to alternative programmers or is made available under different terms and conditions. For example, they point out that the wireless cable industry historically has been financially unstable in general. In addition, they cite problems regarding theft of programming signals in wireless technologies. Cable commenters also note that program networks have expressed concerns about the poor quality of the wireless cable signal.[179] On the other hand, in their comments and in testimony at the cable field hearings, alternative media providers dispute these claims.

117. Moreover, the cable industry notes that offering volume discounts is a widely recognized, legitimate business practice. The cable industry also points out that exclusivity is a bedrock business practice in the

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177 Letter from Michael L. Pandzik, President, NCTC, to The Honorable Alfred C. Sikes, Chairman, FCC, Attachment at 1 (March 15, 1990).

178 Id. at 3. NCTC also states that it has had particular problems dealing with cable networks owned by broadcasting, film studio or major media entities. Id. at 1.

179 For example, The Disney Channel states that SMATV and MMDS wholesale rates are slightly higher than cable operator wholesale rates "[i]n order to account for higher administration and marketing costs, bad debts, and problems with signal security." Letter from Hal Richardson, Senior Vice President, Walt Disney Television, to The Honorable Alfred C. Sikes, Chairman, FCC, at 2 (March 23, 1990). Similarly, in its reply comments, ESPN states that it has not licensed its programming to some MMDS operators because of problems relating to signal theft, financial stability and distribution capabilities. Reply Comments of ESPN at 3.

broadcast and other industries, and argues that the cable industry should also be able to contract for program exclusivity within its franchise area. Further, the industry notes that the Commission favors exclusivity for broadcasters and has expressed opposition to the compulsory copyright.

118. Programmers' access to cable systems. Given the growth in both horizontal concentration and vertical integration in the cable industry since the 1984 Cable Act, complaints have been raised that some cable MSOs have some incentive and ability to limit or impede the national distribution of cable program services that directly compete with the MSOs' vertically owned services. Such conduct is not allegedly directed toward all program services, however, because even some program services with no MSO connection now appear to be so large, established and valuable that they have sufficient leverage in negotiations with cable operators to be assured of carriage on favorable terms.[180] For example, Robert Thompson of TCI testified during the Commission field hearings that certain channels such as ESPN, USA and HBO are, for all practical purposes, "must carries" for all cable systems.[181] In fact, this leverage is borne out by program service contracts which have been reviewed in the course of this proceeding.[182] For example, a typical ESPN contract provides that ESPN "shall have the sole right and privilege to determine which sports events and other programming shall be included in the ESPN Service."[183]

119. Not all new program services have the benefit of association with a "must carry" service or a vertically integrated programmer. The Commission has gathered a significant amount of evidence through its field hearings and follow-up inquiries in an attempt to determine whether new program services without such advantages have access to cable carriage.

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180 Examples of such unaffiliated program services include ESPN, USA Network and The Nashville Network. See Appendix G, Table VII.

181 Testimony of Robert Thompson, FCC Los Angeles Cable Television Field Hearing (Feb. 12, 1990).

182 The Commission's staff has reviewed a number of program affiliation contracts in the course of this proceeding, some of which were submitted under a request for confidentiality.

183 Some affiliation agreements require that certain services be carried on the basic tier to ensure maximum subscriber access; such placement can then reduce demand for other competing services not carried on the basic tier. In another instance, a particular non-vertically integrated programmer specified in its carriage agreement what services its program could be packaged with, specifically prohibiting packaging of the service with other directly competitive programming. See May 24 Lustgarten Letter at 6.

Those inquiries have revealed a number of specific examples of significant access limitations.

120. One example of MSOs' ability to curtail programming services directly competing with their vertically owned programming services involves the attempt of NBC and Cablevision to launch the Consumer News and Business Channel (CNBC). In testimony before the Senate Commerce Committee last year, NBC chairman Bob Wright testified that a number of large MSOs insisted as a condition of carriage that CNBC not become a general news service in direct competition with CNN, which is owned in part by TCI, Time Warner, Viacom and other MSOs.[184] The Commission has obtained copies of typical CNBC carriage contracts which confirm that MSOs have secured this concession from the cable network. The contracts contain a general description of the service to be provided but also stipulate that "[i]t is understood and agreed that it is not the intent of [CNBC] to allow [the service] to become, and the CNBC Service or no segment thereof shall become, a general news service covering events unrelated to [business, financial, consumer and other specified news events]."

121. The cable industry defends such restrictions as mere program descriptions, necessary to ensure that cable programmers stay within a defined niche so that cable systems get the benefit of what they bargained for. However, it appears that the CNBC contract goes beyond past practice in terms of protecting cable systems in their contracts with cable programmers. While contracts frequently contain program service descriptions, most, including that of CNN, appear quite general and do not prohibit particular kinds of programming.[185] Given these differences between the provisions in CNBC and a typical CNN contract, it is not

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184 Specifically, Wright testified that CNBC has "a provision in our affiliation agreement that was requested, required if you will, by most cable operators that we not enter into general competition with CNN." Testimony of Robert Wright, Hearings on Media Ownership, Diversity and Concentration, Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, 101st Cong., 1st Sess. 609-10 (June 14, 21 and 22, 1989). MSOs hold nearly 50 percent of the equity of CNN, which, as the second largest cable network, reaches nearly 55 million cable and alternative media subscribers. See Appendix G, Table VII.

185 For example, a typical affiliation contract with Showtime, a well-established service that has been in business for more than a decade, provides that the cable operator will "distribute the Showtime service without addition, alteration or amendment," and that Showtime merely agrees to "endeavor to provide programming commensurate in quality and amount with a recent [monthly] schedule."

unreasonable to conclude that the effect of the CNBC clause is to protect CNN from competition.

122. By contrast, CNBC's contracts do not preclude it from providing programming that might duplicate or compete with FNN, another consumer news service, or ESPN, both of which are independently owned. In fact, the CNBC contract contemplates that the network will provide "[s]ports oriented programming" and "business and financial news and information."[186] These provisions enable CNBC to offer programming that could potentially compete with ESPN and FNN. Whether this was the intent behind the provisions or, alternatively, whether the MSOs have merely sought to describe the programming they anticipated would be provided by CNBC, the contractual limitations do protect CNN from direct competition to its "general news service" at the same time that they allow CNBC to provide programming that could compete with other unaffiliated program services.

123. Other program affiliation contracts have revealed instances in which large, vertically integrated MSOs sometimes give preferential treatment to program services in which they hold an equity interest. For example, almost all of the contracts between unaffiliated program services and cable operators that we examined give the operators "deletion rights" -- i.e., the right to discontinue carriage of a program service if it modifies its content in a manner inconsistent with the program description set forth in the affiliation agreement. Such deletion rights provisions, however, appear to be absent from or significantly minimized in affiliation agreements between vertically integrated MSOs and their own programming services. In some program service contracts, there are provisions in which large MSOs specifically state that their own program services will be treated differently from non-affiliated programming. In one case, a vertically integrated MSO agreed to offer an independent program service the same carriage guarantees that it offers to any basic or tiered basic cable service. The contract specifically excluded from this provision, however, the MSO's vertically owned basic or tiered basic programming services.[187]

124. Other examples of apparent favoritism toward carriage of services in which the operator has an equity interest have also been brought to our attention. For example, Jones Intercable ("Jones") removed the USA Network

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186 Similarly, carriage contracts for TNT and the Family Channel reviewed by the Commission specifically permit these channels to provide sports programming.

187 The contract states, "other than services in which [the MSO or its subsidiaries] has a substantial economic interest," the MSO will promptly offer the same carriage guarantees to the independent program service as it offers to any basic or any tiered basic cable service.

("USA") from many of its systems after USA sought to negotiate a rate increase, despite the fact that third party audience measurements showed that it was the most highly viewed service on those systems. Jones then deleted USA in favor of the proposed TNT programming service -- a service in which Jones has an equity interest through its investment in TBS -- even though TNT's rates were higher than those proposed by USA. USA ultimately obtained a summary judgment in a U.S. district court proceeding against Jones for breach of contract.[188] When ruling in USA's favor, the district court stated that Jones' intentions with respect to USA "appeared to be anything but benign."[189]

125. Finally, the record reveals that Manhattan Cable TV, Inc., a Time Warner system, repeatedly denied access to Showtime, a movie service owned by Viacom that is a direct competitor to Time's general subscription service, HBO. When Manhattan Cable expanded its channel capacity to create room for additional services, it agreed to carry Showtime, but later refused and instead added its own new pay service, Cinemax.[190]

126. The cable industry generally relies on NCTA's Klein Study to rebut these types of charges of program access abuse stemming from vertical ownership of programmers. In addition to its observations about the availability of cable network programming to alternative media (discussed above), the Klein Study shows that MSOs do not discriminate against unaffiliated programmers. While the Klein Study reveals that virtually all networks are carried more frequently on affiliated MSOs than on non-affiliated MSOs, the differences are quite small. For example, basic cable networks affiliated with MSOs were carried, on average, by 86.7 percent of all affiliated systems and by 78.7 percent of all unaffiliated systems. The difference in carriage is more significant for pay services. Pay cable networks affiliated with MSOs were carried, on average, by 89.8 percent of all affiliated systems, but by 61.4 percent of all unaffiliated systems. See Appendix G, Table XIII. In their comments on the Klein Study, the Department of Justice and the FTC staff also agree that, while carriage decisions are clearly influenced by ownership interests, the available data are insufficient to determine whether the overall effect is anticompetitive.

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188 USA Network v. Jones Intercable, Inc., Civ. No. 6895, slip op. (S.D.N.Y. Jan. 18, 1990).

189 Id. at 18.

190 A New York district court upheld the standing of a citizens' committee that challenged Manhattan Cable's actions on antitrust grounds. New York Citizens Committee v. Manhattan Cable TV, Inc., 651 F. Supp. 802 (S.D.N.Y. 1986). The case was ultimately settled, and Manhattan Cable agreed to carry Bravo, a specialized premium service.

2. Conclusions

127. It seems fairly clear from the above facts that vertically integrated MSOs have the ability to limit competition to particular programming services. For example, it is theoretically possible for large MSOs to limit competition to vertically owned CNN by prohibiting access to their systems by anyone proposing a "general news" service. It also appears that most cable operators have the ability to deny or unfairly place conditions on a programming service's access to the cable communities they serve, and the record in this proceeding indicates that some have done so. This ability reflects some degree of market power in the local video distribution market, which MSOs may leverage on an intermarket basis. The record does not demonstrate, however, that horizontal concentration or vertical integration provides any MSO with the unilateral ability to prevent the launch of new programming services.

128. In addition, vertically integrated cable operators often have the ability to deny alternative multichannel video providers access to cable programming services in which such cable operators hold ownership interests, and there is considerable anecdotal evidence that some have used this ability in anticompetitive ways.

3. Recommendations

129. While we agree with the cable commenters that the Commission should and does generally support exclusivity rights, we believe that the public interest in developing competition to the local cable operator justifies temporary, limited and targeted intervention to ensure that alternative multichannel program providers have fair and equitable access to programming. Reasonable access to programming is important to achieving effective competition among program distributors and fostering maximum possible public choice. To promote the emergence of alternative, effectively competitive multichannel distributors, Congress should reaffirm the applicability of traditional antitrust principles, including the general obligation of firms enjoying market power not to frustrate the emergence of effective competition. In addition, Congress should promote the emergence of alternative multichannel distributors by:

(a) Prohibiting any programming service in which a multichannel video provider holds a cognizable interest[191] from unreasonably refusing to deal with any competing multichannel provider in areas served by the

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191 The Commission would institute a rule making to define "cognizable interest" and to determine the extent to which its current attribution rules would or would not apply.

multichannel provider(s) with which that programming service is vertically integrated;

(b) Defining "unreasonable refusals to deal" to allow (i) bona fide exclusive distribution arrangements that do not significantly impede competition in the local distribution market;[192] and (ii) bona fide volume discounts. In our view, bona fide volume discounts would be either cost-based or otherwise applied equally to both affiliated and unaffiliated customers.

(c) Limiting these special requirements to five years, by which time the Commission should report to Congress on the necessity of reenacting such special requirements.

130. Because it is in many ways inappropriate and inadvisable for the government to intrude in programming negotiations or to substitute its judgment to resolve legitimate business concerns, we recommend that Congress enact legislation providing clear, explicit and convenient administrative remedies for coercion by any multichannel service provider that requires a programming service to yield as a condition of carriage: (a) a financial interest in the programming service; (b) an exclusive distribution arrangement; (c) a refusal to deal with a competing multichannel provider; or (d) an unreasonably restrictive agreement not to compete with any programming service in which that multichannel service provider holds a financial interest.

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192 An example of an exclusive distribution arrangement that might impede competition in the local distribution market and be disfavored by the Commission would be a situation in which a vertically integrated programmer were to create any new exclusive service(s) that unreasonably siphoned extensive programming from any previously non-exclusive service(s).

C. The Franchise Process

131. We have previously discussed the development of competition to local cable distribution of programming to the public, as well as possible obstacles to such competition. In this section of the Report, we discuss the extent to which the franchising provisions of the Cable Act and the regulatory activities of some local authorities may discourage or even preclude competing cable systems or other competing multichannel media.

1. Background

132. We briefly discussed above the difficulties a competing second cable system faces in entering a local market already served by another operator. While the present number of directly competitive systems is small, it appears that the number of these systems is beginning to grow. We have identified three factors that should promote the continued development of competing systems: (a) the likelihood that more municipal authorities may grant franchises to competing systems; (b) the gradual decline in number of available unwired, attractive markets; and (c) the dramatic increases in cable advertising revenues (projected to exceed $2 billion in 1990), which should increase the overall available income and thus broaden the potential support base for competing systems.[193]

133. As we also discussed in Section IV-A above, alternative distribution media, including wireless cable, SMATV and HSD distributors, have all faced problems due to restrictive local regulations and unsettled questions of law concerning the requirement to obtain a local franchise. In particular, alternative media interests assert that the following factors have slowed or in some areas blocked their success: (1) "universal service" requirements, (2) regulations restricting the use, size or height of antennas and other receiving equipment, (3) discriminatory mandatory access to buildings for the purpose of providing multichannel video service, and (4) confusion regarding whether delivery media that do not cross public rights of way with wire are subject to franchising requirements.

2. Findings

134. Despite some promising developments, the record in this proceeding reveals competing systems face several problems that can be eased by changing the franchise process. First, cable companies interested in competing with existing franchisees assert that some franchise authorities require second systems to serve the entire market (i.e., "universal service" requirements), thus precluding a more economically feasible incremental approach to service. Second, some franchising authorities require new entrants to meet a variety of

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193 See supra para. 99.

municipal requirements that apply to existing operators and which, it is argued, are more sustainable for a sole operator. Third, some franchising authorities require second entrants to meet certain requirements, such as the posting of a bond or letters of credit, not imposed on the incumbent. Fourth, some jurisdictions have granted exclusive franchises, an unwise policy in our judgment.

135. In many localities, alternative media distributors face land use regulations that prohibit or restrict the use of antennas and other receiving equipment. These regulations have taken many forms, including the imposition of (1) requirements for building permits for the installation of satellite dishes or antennas of more than a particular size (only 2 feet in diameter in one instance), (2) extensive regulatory review procedures as a condition to allowing the installation of antennas, and (3) height restrictions on receiving equipment. Some localities even prohibit the use of any outdoor antennas.

136. Wireless cable interests point out that the Commission has preempted land use regulations that inhibit the development of MMDS[194] and has ruled against HSD antenna restrictions intended to protect cable systems from competition.[195] These parties believe that the Commission's rulings have already preempted local regulations that interfere with the installation of wireless cable reception points, but uncertainty at the local level has hampered the growth of this distribution system.

137. As a separate matter, thirteen states and the District of Columbia presently have mandatory access laws.[196] The stated purpose of these laws is

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194 See Orth-O-Vision, Inc., 69 FCC 2d 657 (1978), recon. 82 FCC 2d 178 (1980); New York State Commission on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

195 See Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983), aff'd, New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984); Report and Order in CC Docket No. 85-87, Amendment of Rules Concerning Preemption of Local Zoning Regulation of Receive-Only Satellite Earth Stations, 51 Fed. Reg. 5519 (Feb. 14, 1986).

196 As noted above, in some states where no mandatory access law exists, local authorities reach the same result by applying § 621 of the Act, which provides franchised cable operators with access to "dedicated easements," to private easements. In this way, franchised cable operators are granted access to all buildings in which an internal cable system is provided to occupants. But see Cable Investments v. Woolley, 867 F.2d 151 (3rd Cir. 1989) (holding that no such right is created by the Cable Act).

to ensure that tenants may not be denied access to multichannel video services by building owners. However, some commenters allege that in practice these laws discriminate against alternative delivery media in favor of franchised cable operators, because access is mandated for franchised cable systems only. As a result, it is contended that these statutes have been used by franchised cable operators to require property owners to grant them access to their property, even when these owners have arranged for and offer similar video services to their tenants using competitive technologies.

3. Conclusions

138. The video marketplace is changing in ways that should further encourage the development of more competing cable systems. While exclusive franchising is not the only impediment to the growth of second competitive systems, it is clear that the number of competitive systems would grow at a more rapid pace if local franchise authorities were unable to discourage or forbid such systems. While it may not be feasible to require franchise authorities to award two or more system franchises (since there may not be more than one firm willing to serve), we see no valid reason to discourage or forbid competing systems. We believe that local authorities have a significant role in ensuring that consumers receive reasonable service. In Section V-B below, we discuss our recommendations concerning local regulation of service quality, both technical and nontechnical.

139. New competitors can often enter the market only by providing a limited number of products or services, or by serving a limited number of customers. Such fringe competition, although not initially full-fledged, usually results in lower prices or the provision of new service, which benefits consumers.[197] This has been the pattern in the cable industry. Thus, requiring second or additional entrants to the market to provide "universal service" from the outset is, in our judgment, ill-advised. The Cable Act, however, contains a provision that may discourage franchising authorities from allowing the type of incremental service that is often essential to the entry of a second competing cable system.[198]

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197 The experience of MCI and other competitors in the interexchange telecommunications market provides a good example of the benefits that fringe competition can create. In this market, initial geographically limited competition blossomed into broader competition benefitting more consumers as the competition grew.

198 Specifically, Section 621(a)(3) of the Cable Act prohibits discrimination based on the income of the residents of a franchise area. While this is an important policy objective, this provision should be modified to ensure that it is not applied to competitive entrants at the time they enter the market. Although existing operators and some franchising authorities state that this will lead to "cream skimming," the nature of the

140. After reviewing the record, we believe that discriminatory local mandatory access laws can operate to hinder the growth of alternative distribution services. Legislative action is also needed to cure this problem. In a related matter, in 1978, the Commission determined that wireless cable systems were exempt from franchising requirements. However, that issue was reopened as a result of two conflicting district court decisions concerning the definition of a cable system in the Commission's "Cable Definition" proceeding in MM Docket No. 89-35.[199] In that rule making, the Commission asked whether entities such as SMATV systems, MMDS and DBS systems should be considered cable systems under the Cable Act and therefore should be potentially subject to franchise regulation. We expect to address these questions in the future in the "Cable Definition" proceeding.

4. Recommendations

141. We recommend that Congress amend the Cable Act to forbid local franchise authorities from unreasonably denying a franchise to applicants that are ready and able to provide service.[200] Congress should also make it clear that local authorities may not pass rules whose intent or effect is to create unreasonable barriers to the entry of potential competing multichannel video providers. Franchise requirements should be limited to appropriate governmental interests, such as establishing requirements concerning public health and safety, repair and good condition of public rights-of-way, and the posting of an appropriate construction bond. We also recommend that Congress

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broad-based demand for cable services should minimize the prospect that in the long term new entrants would find it profitable to only serve limited groups of homes within a metropolitan area. Further, if franchising authorities prohibit rate discrimination by the incumbent, even those subscribers not initially having the choice of a second service will benefit from lower prices resulting from competition in other parts of their communities.

199 The two court cases are City of Fargo v. Prime Time Entertainment, Inc., No. A3-47, slip op. (D.N.D. March 28, 1988) and Pacific and Southern Co. v. Satellite Broadcast Networks, Inc., 694 F. Supp. 1565 (N.D. Ga. 1988).

200 While the issue has not definitively been decided by the courts, it is clear that cable operators have significant first amendment rights in connection with the operation of their systems. For example, courts have struck down mandatory state-of-the-art technical requirements on first amendment grounds. See Preferred Communications, Inc., v. City of Los Angeles, No. CV 83-5846 (CBM), slip op. (C.D. Ca. Jan. 5, 1990). Limiting the franchising authorities' powers to regulating only those matters of traditional local concern would serve first amendment goals as well as remove significant obstacles to competition at the local level.

amend Section 623(a)(3) of the Cable Act to permit competitive entrants to enter a market already served by a cable system without the obligation to provide "universal service" for an initial and limited period of time following their entry into the market.

142. To remedy the anticompetitive effect of local restrictions pertaining to receiving equipment and building access, we also recommend that Congress prohibit local governments from regulating installation of reception equipment beyond those provisions reasonably related to a clearly defined health, safety or reasonable aesthetic objective.

D. The Broadcast/Cable Relationship

1. The Imbalance in the Broadcast-Cable Relationship

(a) Background

143. The FCC has sought, over the years, to fulfill its mandate to foster a mass communications framework conducive to the "public interest, convenience and necessity" by relying on two principal values: localism and diversity. These values are distinct but reinforcing; they complement each other, as the diverse groups and cultures in our continent-wide nation bring about local and regional pluralism.

144. Today, both radio and television reflect our diverse nation. In city after city, locally-originated news and public affairs programs generally provide information of interest primarily within a station's coverage area. Most Americans are able to choose daily from a number of television channels and hours of local programming to learn what happened at the city council meeting or to find out about tomorrow's weather.

145. While this locally-originated programming most closely mirrors the diversity of our nation, considerable credit for its existence must go to the framework in which it is broadcast -- a framework formed by the national programming networks and the skillfully-crafted combinations of programming they buy from independent producers. The networks, their affiliates and independent stations marshal massive resources to mix and blend this programming to appeal to the viewing audience. Clearly a local station's strength lies not only in its individual programs, but also in this synergy of local and national offerings.

146. In the current market for video programming, broadcast stations and cable systems have a complex, highly interdependent relationship. On the one hand, they compete for viewers, programming and advertising revenues; on the other hand, broadcast stations provide a primary source of programming for cable systems, and cable carriage of broadcast signals improves a station's reach and reception quality and thus increases broadcast stations' audiences. Laws and regulations governing the relationship between broadcast stations and cable systems, particularly the presence or absence of must carry

obligations and cable television's compulsory license to retransmit broadcast signals, can have a major effect on the financial health and competitive relationship of the two media and on the availability of video programming to the public. The Commission is specifically concerned that the absence of must carry rules, coupled with the compulsory license, may have drastically changed the competitive relationship of the two media and upset the balance of the market.

147. More than two decades ago, when cable television was in its infancy, the courts ruled that cable could carry broadcast signals without seeking broadcasters' consent or paying them for the use of the signals.[201] Then, 14 years ago, when cable was an emerging but still relatively young industry, the government affirmatively decided to support cable's development by letting it convey, with virtually no compensation, locally originated programming and the locally transmitted mix of regional and national programming. The device for this arrangement was the compulsory copyright license.[202] In short, to foster the growth of a new and promising industry -- an industry which initially served to improve television reception and introduce a limited amount of new television programming into the local market through carriage of distant broadcast signals[203] -- the government forced the cable television industry and the broadcast television industry into a significantly imbalanced "contract." This contract achieved its intended result; cable's compulsory access to broadcast programming helped make the fledgling industry viable and foster its explosive growth. It also assisted broadcasters in reaching many homes that previously were technically difficult to reach.

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201 TelePrompter Corp. v. Columbia Broadcasting System, Inc., 415 U.S. 394 (1974).

202 Cable systems paid no copyright fees for either local or distant broadcast signals until 1976. In the Copyright Act of 1976, Congress established both copyright liability for unauthorized cable retransmissions of broadcast programming and the compulsory copyright licensing process for the cable television industry. The compulsory license permits cable operators to retransmit broadcast signals without obtaining permission, provided the operator pays a compulsory license fee to the Copyright Office. The fees are then distributed to copyright holders. 17 U.S.C. §§ 101 et seq. The royalty payments are minimal for local signals and larger for distant signals, but in most cases they do not reflect the market value of the programming to cable operators.

203 See Cable Television Syndicated Program Exclusivity Rules, 79 FCC 2d 652, 816-826 (1980) ("1980 Syndex Report"); Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299, 5300-5302 (1988).

148. Again with the goal of furthering this diversity and growth and making cable service more widely available, Congress enacted the 1984 Cable Act. Passage of the Cable Act resulted in substantial deregulation of the cable television industry. In the six years after the Cable Act's passage, cable has continued to grow, extending its reach to roughly 90 percent of the nation's households and increasing its penetration to almost 60 percent of all television households (about 63 percent of homes passed). Moreover, cable systems increasingly sell advertising time, thus competing with broadcasters directly in the market for advertising as well as for viewers.[204] With its increased revenues, the cable industry has steadily enhanced its stock of cablecast programming. A number of distinctive national cable program services have emerged offering new and appealing programming. Not only has original cable programming increased, but cable is increasingly able to obtain exclusive rights to sports and other entertainment programming that formerly would have been available to broadcast networks and stations.

149. Cable -- no longer a fledgling, struggling industry -- continued to enjoy the benefits of the compulsory license for its carriage of broadcast signals into the 1980s. The imbalance resulting from the growth in cable's advertising revenues and cablecast programming was, in our view, critically exacerbated by the loss of must carry rights by local broadcasters in 1985.[205] With the compulsory copyright license and without must carry obligations, cable operators are able to engage in a type and degree of competition against local broadcasting that was unenvisioned and unintended when the Copyright Act was adopted. Cable operators carry the most popular local stations with virtually no compensation to the stations, use the audience they derive from carriage of these stations to increase their own advertising revenue and, in turn, buy more and better cable-exclusive programming, further draining

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204 Sale of advertising time by the cable industry is growing rapidly. Estimates reported by the cable industry show that total expenditures on cable television advertising rose from $594 million in 1984 to $2.02 billion in 1989. Local cable advertising expenditures rose from $98 million to $496 million during that period. Total broadcast television advertising expenditures increased from $19.31 billion in 1984 to $25.65 billion in 1989. Thus, cable's share of the total rose from 3.0 percent in 1984 to 7.3 percent in 1989. Cable's 1989 share in local advertising was 6.0 percent. NCTA, Cable Television Developments (May 1990), citing Paul Kagan Associates, Inc., Cable TV Advertising (April 26, 1990); 58 Television and Cable Factbook, Cable & Services at C-332 (1990 ed.).

205 Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985); cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987).

audience and advertising revenues away from local stations. Indeed, some cable operators are now also beginning to compete directly with local television stations, creating channels that look very much like traditional broadcast television stations. The strong localism and diversity in broadcast television service -- positive forces that fifty years of regulatory policy under the Communications Act have sought to develop -- will be jeopardized if this situation continues unredressed.

150. In light of these public policy concerns, this Commission recommended in 1989 that Congress eliminate the compulsory license, concluding that private negotiations would better serve the public interest.[206] The Notice recognized the importance of the compulsory license to the issue of must carry rules. It pointed out that broadcasters claim it is unfair that cable systems can acquire broadcast programming at rates set by the government without the owners' permission, but local broadcasters have no guarantee of access to cable systems. As we observed then, the rationale for the compulsory license was to avoid the transaction costs of negotiating licenses for cable retransmission when cable operators were required by the must carry rules to retransmit broadcast programming. Without must carry, this rationale largely disappears. We specifically sought comment on the interplay between must carry and the compulsory license.

151. Many broadcast parties continue to argue in favor of conventional must carry rules. Proposals for such conventional carriage rules contained various provisions designed to meet constitutional concerns, such as limits on the type, location and number of stations that would be entitled to mandatory carriage, and exceptions to avoid signal duplication. Low-power television stations urged that they be included in must carry requirements, and public station advocates suggested the need for special carriage rules for public stations. Television station commenters also stressed the need for rules pertaining to channel location in order to prevent cable operators from arbitrarily and anticompetitively shifting broadcast stations to undesirable channels. Many commenting cable parties indicated no fundamental objection to the adoption of mandatory signal carriage legislation, provided the specific provisions were reasonable and a constitutional justification could be developed. In opposition, however, other cable interests and NTIA argued that such regulations were neither desirable policy nor legally sustainable, citing prior judicial findings.

152. Some parties supported the suggestion in our Notice that if Congress retains the compulsory licensing provisions of the Copyright Act, carriage rules might properly be tied to continued cable system exercise of

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206 Report on the Compulsory License for Cable Retransmission in Gen. Docket No. 87-25, 4 FCC Rcd 6562 (1989).

the advantages derived from these provisions. These parties offered proposals that would require a cable operator to carry all local station signals if the operator sought to carry any one broadcast signal (local or distant) under the compulsory license. Other parties urged that if systems take advantage of the compulsory license, they should not only be required to carry local station signals, but also to pay a new fee to the local stations. For example, NAB proposed that Congress amend the Communications Act to create a retransmission consent requirement, under which cable systems would pay a statutorily-set retransmission fee for the right to retransmit local broadcast signals, which would be deposited at the Commission (or other governmental agency) and then distributed to broadcast and copyright claimants.[207] The retransmission consent proposal is intended to permit broadcasters to be compensated for the added value -- beyond the value of the individual programs broadcast -- that broadcasters create through developing, purchasing, producing, scheduling, promoting and transmitting a mix of national and local programs for broadcast.

(b) Findings and Conclusions

153. Today, the local broadcast television industry, which has grown from 962 to more than 1,400 stations since the compulsory copyright license was enacted, increasingly is threatened and disadvantaged. The decline of the networks' audiences has been the focus of extensive press coverage. Less has been said, however, about the local competitive balance. Locally, while many stations remain strong, generally the value of television stations has fallen; and in an almost unprecedented development, we now see cases of local television stations failing. This development is undoubtedly due to a number of forces, but the emergence of strong national cable television companies, with rights to serve as exclusive local providers of dozens of channels, is surely a significant factor, as is the power of cable television to attract both subscriber and advertising revenue.

154. In the current environment, the lack of must carry obligations, especially when combined with the effect of the compulsory license, creates an imbalance between broadcasting and cable television. The nature and effects of this imbalance are a matter of immediate public policy concern and need to be addressed expeditiously. Accordingly, Congress should enact must carry rules tied to cable's continued enjoyment of the compulsory copyright license. The need for such a remedy at this time is further buttressed by the fact that cable systems are currently the only multichannel carriers of programming in most markets, making it difficult for local broadcasters to negotiate on even terms with cable operators and rendering it impossible for them to extract the full value of their programming from cable systems even if the compulsory license were to be abolished. In the interim, a must carry rule coupled with

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207 See Comments of NAB at 56-61.

the compulsory license is the best way to fully protect broadcasters' interests and the interest of the local communities they serve.

155. Notwithstanding the need for must carry rules coupled with the compulsory license at this time, the long-term interests of the viewing public, in our judgment, demand that the government should withdraw from dictating contractual relationships between local stations and cable television distributors. If television stations, in the foreseeable future, are prohibited by the government from receiving value for their products, the government may be complicit in the demise of a system which today offers Americans a diversity of voices, presentations, interpretations and opinions.

156. Even if must carry rules are enacted, under the current copyright regime local broadcasters cannot compete on an even footing with cable systems. The compulsory license allows cable systems to use programming at little cost for which local broadcasters may have paid substantial sums, and also provides cable with a subsidy for importing distant broadcast signals that closely resemble local stations and which thus compete directly with the local stations for viewers. These imbalances undermine the viability of local television. Consumers thus have an important stake in seeing that local television stations remain healthy as a source of diversity and of local programming. Additionally, the compulsory license fails to recognize the added value local broadcasters provide when they construct successful programming schedules mixing local and national programming -- the value of the whole is greater than the mere sum of the parts.

157. We believe that ultimately the preferable public policy goal is to redress the competitive imbalance between cable systems and local broadcasters by giving broadcasters the right to control the use of their signals. If cable systems were required to obtain the consent of local stations to carry their programs, local stations would be able to negotiate the terms of their carriage on cable systems and would receive compensation for their programming commensurate with its value to cable systems and viewers. Broadcast stations would gain a measure of competitive leverage relative to cable systems that did not depend on government intervention. Imposing retransmission consent provisions would warrant elimination of the compulsory copyright, which would have the additional advantage that with full copyright liability, consumers would benefit from a menu of programming more closely matched to their preferences and delivered by a more efficiently utilized group of transmission media.[208]

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208 An alternative to the imposition of a retransmission consent scheme would be clarification or recognition of a local broadcaster's substantial compilation copyright interest in the programming it packages.

158. If Congress chooses not to reimpose a must carry requirement, or if must carry expires or is not sustained, the compulsory copyright provisions of the Copyright Act should, in our judgment, be repealed in order to correct the serious imbalance between the two industries.

159. If the Congress decides that the compulsory copyright system should be retained in some form, regardless of any must carry requirement, then we believe that Congress should consider repealing the compulsory copyright for distant signals. While we do not necessarily advocate an immediate repeal of this provision, we do believe such a provision should sunset when alternative multichannel providers are fully competitive with cable. In considering this proposal, we recognize both the costs and benefits of such a recommendation. The benefit is that such an action would end a cable system's ability to carry distant signals at below-market prices in competition with local stations. It also would remove a cable system's incentive to bias their programming toward distant signals. On the other hand, we recognize that must carry rules for local signals would provide a measure of protection against disparities in broadcast and cable programming choices due to compulsory copyright. In addition, we note that the compulsory copyright for distant signals assists in lowering the transaction costs for competitive multichannel alternatives to the local cable operator. Further, we note that the existing compulsory copyright system has played a role in the development of the present, increasingly diverse, multichannel television distribution system.

160. Although advertising sales by cable systems may exacerbate the disadvantages broadcasters suffer due to the compulsory license and the ability of cable systems to manipulate channel positioning of or otherwise disadvantage broadcast stations, we find that any ability of cable systems to behave anticompetitively toward broadcasters derives from their market power in the program delivery market and from the inequities of the current compulsory license regime, not from advertising sales per se. Thus, we find that the cable industry's involvement in advertising raises no concerns and, indeed, to the extent that advertising revenues enable cable systems to provide additional programming, the public benefits.

(c) Recommendations

161. We believe that as long as a significant competitive imbalance exists between single-channel and multichannel competitors in the local television market, mechanisms are required to correct that imbalance. Accordingly, we recommend that Congress adopt a must carry regime to safeguard local broadcast stations so long as the compulsory copyright license for local broadcast programming exists. This regime, including compulsory copyright, should sunset at the same time as any program access provisions enacted pursuant to our recommendations above at paragraph 129.

162. Either in the absence of or due to the expiration of any must carry regime, Congress should repeal the cable compulsory license and amend the

Communications Act to provide local broadcast stations a clearly defined right to bargain for compensation for retransmission of their programming.

163. Because of the unique service provided by noncommercial television stations, and because of the expressed governmental interest in their viability, we believe that all Americans should have access to them. We believe that mandatory carriage of noncommercial television stations would further this important goal. Specifically, we recommend that must carry provisions for noncommercial television stations consistent with the recent agreement between the National Association for Public Television Stations and the National Cable Television Association be incorporated into the Communications Act.[209]

2. Channel Repositioning

(a) Background

164. In 1988, the Commission opened MM Docket No. 88-138 to establish an empirical record concerning the carriage of local broadcast signals by cable systems in the absence of carriage rules. 3 FCC Rcd 2698 (1988). The record in that docket was incorporated into this proceeding, and we requested information on the need to reimpose some form of carriage rules.

165. The information obtained in MM Docket No. 88-138 indicated that a number of local stations were subject to noncarriage or to channel repositioning.[210] That proceeding, however, did not focus on or attempt to explain the factors affecting cable systems' carriage decisions. Thus, it was not clear whether those decisions reflected cable operators' perception of subscribers' preferences or intentional efforts to harm competing broadcast stations. The responses to our present Notice added little factual data to the information concerning carriage and repositioning gathered in Docket 88-138. Some broadcasting interests asserted that cable operators use channel placement techniques to enhance the success of cable offerings (e.g., by placing cable programming services near the most popular broadcast stations) or to hinder the viewing of broadcast stations (e.g., by placing those stations on high-numbered channels).[211] Broadcasters offer anecdotes of

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209 See Agreement of March 28, 1990, incorporated in H.R. 4415; see also Reply Comments of National Association of Public Television Stations and Reply Comments of NCTA.

210 Data concerning noncarriage and channel repositioning are contained in the Commission's September 1, 1988, "Cable System Broadcast Signal Carriage Survey Report" and in findings responsive thereto, which are included in MM Docket No. 88-138.

211 See, e.g., Comments of Chris-Craft Industries, Inc. at 1-7; Comments of

egregious cases of channel repositioning that they claim clearly harmed the broadcast stations involved.[212] As stated earlier, large MSOs have the ability and incentive either to create or limit competition to particular program services.[213] Furthermore, cable operators are continuing to aggressively sell advertising and are creating local broadcast-like channels. Such activities may create additional incentives to exercise control over competing advertiser supported services such as broadcasting. While most cable operators choose to carry local broadcast channels, as our data show, cable operators may disadvantage broadcast channels by repositioning their channel carriage during critical audience measurement months. Channel repositioning results in lower audience measurement and lower rates that stations can charge for advertising. Such activity harms broadcasters' ability to provide diverse programming and to meet programming obligations of Section 307(b) of the Act.

(b) Findings

166. Cable and broadcast programming compete for advertising revenues. Cable operators' incentive to provide disadvantageous carriage (e.g., frequent or ill-timed channel repositioning) to programming services in which they have no financial interest appears to be particularly great as against local broadcasters. This creates a market disadvantage in local commercial broadcasters' ability to compete against cable operators for advertising revenues. Although we have no comprehensive evidence of industry-wide abuse of channel-positioning powers, egregious cases that appear to be anticompetitive in intent have occurred.[214] Such cases could be prevented by a rule containing narrowly circumscribed channel positioning restraints.

(c) Recommendations

167. We believe that channel positioning concerns are best addressed by limiting changes in channel assignment. We recommend that the Congress restrict changes in the channel assignment of local broadcast stations except

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NAB at 2-3; Comments of 97 Television Stations at 4-5.

212 For example, Chris-Craft Industries asserts that the cable system serving Oakland, California shifted the channel position of station KBHK three times in four months, and then changed that station's channel position again a year and a half later. Cases were reported of channels being repositioned during ratings sweeps periods.

213 See supra para. 127.

214 See, e.g., Comments of Chris-Craft at 10-16; Comments of 97 Stations at 5; Attachment 10 to Comments of INTV.

under the following conditions: (a) when channel repositioning is mutually agreed to by the broadcaster and the cable operator; or (b) when technical limitations of the cable system prohibit carriage on a specific channel. Adequate prior notice for any such channel repositioning must be given to the station as well as to subscribers. We recommend that restrictions placed on channel repositioning begin with broadcast channel positions on cable systems as of June 29, 1990, pursuant to the industry compromise reached on channel repositioning.[215] This provision should sunset upon adoption of a retransmission consent regime.

E. Leased Access

168. A number of commenters voiced concern over another access issue: the difficulty in gaining carriage over the "leased access" channels that the Cable Act requires cable operators to set aside for unaffiliated programmers.

1. Background

169. Section 612 of the Cable Act requires certain cable systems to lease channels to unaffiliated entities. The stated purpose of this provision is "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems." 47 U.S.C. § 532(a).

170. Capacity requirements. The leased access requirement does not apply to cable systems with fewer than 36 activated channels. Cable systems with 36-54 activated channels must set aside 10 percent of these channels for this purpose, and systems with 55-100 activated channels must set aside 15 percent. Cable systems with more than 100 activated channels must dedicate 15 percent to leased access.[216]

171. Terms and conditions. Section 612(c) instructs cable operators to establish the price and conditions for use of leased access channels in such a way that this use "will not adversely affect the operation, financial

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215 The terms of this compromise are reported in Communications Daily, July 23, 1990, at 1-2.

216 See 47 U.S.C. § 532(b). For cable systems with 36-100 activated channels, channel capacity does not include channels required or prohibited by federal law or regulation. Thus, channels used to fulfill must carry obligations, should they be reimposed, and channels not used due to Commission regulations regarding interference with aeronautical frequencies are not included.

condition, or market development of the cable system." Moreover, cable operators are prohibited from exercising "any editorial control" over leased access programming and may not "consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price" for use of the channel. 47 U.S.C. § 532(c).

172. The legislative history of the Cable Act provides additional information regarding the intent of Congress in establishing leased access.[217] The purpose of Section 612 is to promote and encourage "an increase in the sources of programming available to the public," and to "assure the widest possible diversity of information sources to the public." The House Report notes that cable operators do have incentives to provide diverse programming, but that these incentives are limited "when a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system." The price and other terms for commercial use of cable channels are to be set so they will not "adversely affect the operation, financial condition, or market development of the cable system." The intent of the Committee is not to "adversely affect the cable operator's economic position, since it is not the cable operator's exercise of any economic power, but his exercise of editorial control which is of concern to the Committee."

173. The House Report also explicitly states (at 51) that there is not a requirement to provide leased access channels on a non-discriminatory basis, noting that the fair market price for access will differ according to the content of the service. It gives as examples a premium movie service, a news or public affairs service, and an instructional or educational service. Cable operators are permitted to consider the "nature (but not the specific editorial content) of the service being proposal [sic], how it will affect the marketing of the mix of existing services being offered by the cable operator to subscribers, as well as potential market fragmentation that might be created and any resulting impact that might have on subscriber or advertising revenues." The House Report also indicates (at 52) that cable operators are not required to provide "marketing, billing, or other such services" to users of leased access channels.

174. Enforcement. The enforcement mechanism established in Section 612(d), (e) and (f) is a cumbersome one. Aggrieved parties may bring action in federal district court, which is empowered to order cable operators to

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217 House Report at 50-52.

provide access to channels in accordance with this section, to establish price, terms and conditions for such access, and, in its discretion, to award actual damages. Aggrieved parties may also petition the Commission for relief if there have been three or more adjudicated violations against the cable operator in question. The Commission can provide the same relief (except for awarding damages) that the courts can provide. The FCC has the additional power to establish rules and regulations governing provision of leased access channels by the cable operator in question and other cable systems owned by the same entity, provided that the Commission determines that a "pattern or practice of violations" exists.

175. In evaluating the price and conditions of access offered by a cable operator, the courts and the Commission are directed to presume that they are "reasonable and in good faith unless shown by clear and convincing evidence to the contrary." Moreover, courts are prevented from considering "any price, term, or condition established between an operator and an affiliate for comparable services." The House Report (at 53) implies that, in this context, "affiliate" means a commonly-owned programming service.

176. Section 612(g) authorizes the Commission to "promulgate any additional rules necessary to provide diversity of information sources" when cable systems with 36 or more activated channels are available to 70 percent of American households and 70 percent of households with access to such systems choose to subscribe (the "70-70 criteria"). The legislative history of this subsection emphasizes that leased access is designed to further the "First Amendment goal of assuring diversity." 47 U.S.C. §532(g).

2. Findings

177. Few commenters provided information or argument as to the extent to which the leased access mechanism has been used, the feasibility of the mechanism, whether it can or could be used to ameliorate possible competitive problems and promote diversity and access, the changes that might be needed to strengthen the leased access mechanism, and whether such changes could be implemented by the Commission without additional legislative action. NYC/NLC and the State of Hawaii suggest that the implementation of leased access has been frustrated because cable operators have established unreasonable terms or, in some cases, simply refused to discuss the issue.[218] Other commenters complained that the enforcement mechanism for leased access is too cumbersome to be effective. These commenters cite the expense of litigation and the high burden of proof on the would-be lessee. On the other hand, the City of Eau Clair, the New York

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218 Comments of NYC/NLC at 70-71. Comments of State of Hawaii at 16, 23.

State Commission on Cable Television, Continental Cablevision and NCTA assert that the demand for leased access is very low.[219]

178. As noted above, the Commission cannot adopt additional rules on leased access until the "70-70 criteria" have been met. NCTA provides data from Nielsen indicating that 48.7 percent of American television households are passed by cable systems with 36 or more channels and 57.3 percent of those households subscribe to cable.[220] NCTA notes that the Cable Act specifies total households as the universe, but the Nielsen data refer to television households, a smaller set. Thus, the 48.7 percent figure is a slight overestimate of the fraction of total households passed by cable systems with 36 or more channels. Moreover, some of the changes needed to make it possible for leased access to be an effective source of competition would likely not be permissible for the Commission to make under Section 612(g). Consequently, Congressional action is required to provide for prompt modification of the leased access provisions.

179. Unless the purpose of Section 612 is modified to include the goal of promoting competition, the rate setting process would presumably continue to be constrained by language in the legislative history of the Cable Act to the effect that leased access is not intended "to adversely affect the cable operator's economic position."[221] Rates, terms and conditions set according to such criteria are unlikely to facilitate vigorous competition by independent programmers to the services selected by the cable operator.

3. Conclusions

180. Although leased access was not designed to deal with the possible exercise of market power by cable operators vis-a-vis programmers, we believe that it is a promising alternative or supplement to the measures regarding programmer access to cable facilities discussed in Section IV-B of this Report. A new focus on promoting competition to the cable operator renders the operators' discretion to set the leased access rates and conditions inappropriate. When leased access is used competitively, i.e., as a means of delivering a program service that has faced difficulties in amassing the number of subscribers nationwide necessary to begin service, it

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219 Comments of the City of Eau Claire, Wisconsin, at 4; Comments of New York State Commission on Cable TV at 9; Comments of Continental Cablevision, Inc., at 103; Comments of NCTA at 92.

220 Comments of NCTA at 89.

221 We note that currently pending in the Senate is a proposed amendment that would modify Section 612(a) to add as a goal: "to promote competition in the delivery of diverse sources of video programming."

is likely that the program service (or a "channel broker," see below) would be seeking access to a number of cable systems across the country. For this competitive purpose, it is appropriate to have a national framework of rules governing leased access. Moreover, the Commission has the experience, expertise and resources to develop such a framework. Local franchise authorities generally have far more limited resources.

181. We are convinced that the current enforcement provisions of Section 612 are too cumbersome, particularly given that the use of leased access with its newly assigned purpose is likely to be much greater than anticipated if Congress were to adopt the leased access legislation. In its contemplated new form, leased access could increase the diversity of programming available over cable, promote competition to the channel package selected by the cable operator, and provide a check on any incentives that cable operators might have to exclude unaffiliated programmers or otherwise take undue advantage of their bargaining power as the only or primary multichannel provider across the country.

182. If leased access becomes an established channel acquisition mechanism, it is quite possible that "channel brokers" will come forward. These entities would be in the business of accumulating leased access channels across the country and then "subleasing" them in groups to program services. These brokers could then provide program services with access to subscribers, independent of cable operators and with reduced transactions costs.

4. Recommendations

183. For these reason, we recommend that the Congress amend the leased access section of the Cable Act. We suggest first that Congress amend Section 612(a), the statement of purpose, to include the "promotion of robust programming competition." Second, we urge Congress to either change the burden and standard of proof required to establish a violation, or

delegate to the Commission the authority to do so. As noted above, the proposed new, pro-competitive purpose of Section 612 would make it inappropriate to retain the deference given to cable operator choices regarding leased access rates. Third, we suggest that Congress give the Commission original jurisdiction to resolve disputes over the provision of leased access channels. Fourth, we recommend that Congress require cable operators to provide billing and collection services for channel lessees and authorize the Commission to craft the relevant rules. We emphasize that these enhanced leased access requirements in no way obligate a cable operator to carry programming that is obscene or otherwise unprotected by the law.[222]

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222 See 47 U.S.C. § 532(h); see also Enforcement of Prohibitions Against the Use of Common Carriers for Transmission of Obscene Materials, 2 FCC Rcd 2819 (1987) (describing standards for denying transmission of obscene programming by an MDS carrier).

V. LOCAL REGULATORY ISSUES

A. Effective Competition and Rate Regulation

184. Background. Section 623 of the Cable Act permits local franchising authorities to regulate basic service rates only in those situations where the cable system is not subject to "effective competition."[223] The Cable Act directed the Commission to define the circumstances in which a cable system is not subject to effective competition and to establish standards for the regulation of rates for basic cable service[224] by local franchising authorities in such cases.[225] In addition, Section 623 requires the Commission to periodically review its regulations on effective competition.[226]

185. Under existing Commission rules, adopted in 1985, a cable system is deemed subject to effective competition if at least three unduplicated broadcast television signals are "available" over the entire cable community.[227] That standard counts a broadcast signal as available based on predicted Grade B coverage or "significantly viewed" status in the cable community.

186. The presence of three over-the-air broadcast signals has not been an appropriate measure of effective competition to cable service, and, in our judgment, is not viable.

187. Sensing that the old standard might no longer be viable, we initiated a Notice of Proposed Rule Making earlier this year seeking comment on whether the three signal standard remains valid, and, if not, what might constitute a more appropriate standard.[228] Extensive comments have been

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223 47 U.S.C. § 543.

224 The Cable Act defines "basic cable service" as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522(2).

225 47 U.S.C. § 543(b)(2)(A) and (b)(2)(B).

226 47 U.S.C. § 543(b)(3).

227 47 C.F.R. § 76.33(a). The Commission also established procedural requirements for those franchising authorities that regulate basic cable rates, although the specific rate-setting methodology used to set such rates was left to the local franchising authorities. Id.

228 See Notice of Proposed Rule Making in MM Docket No. 90-4, 5 FCC Rcd 259 (1990). Commenters were also asked whether the standards for rate regulation

received in that proceeding, and we are currently evaluating the most appropriate revisions to our effective competition regulations.

188. Congress is actively considering legislation that may substantially alter the effective competition provisions of the Cable Act.[229] In particular, Congress may redefine effective competition in a sweeping way or discard this test altogether and require that all basic service tiers be rate regulated.

189. Findings. The pendency of these legislative efforts, combined with the extensive comments the Commission has received on its proposal to change its effective competition regulations, make it appropriate, in our judgment, for the Commission to defer adoption of a new definition of effective competition at this time. Nevertheless, because the legislative process is currently still at a stage in which some indication of options the Commission considers promising might be of material assistance to the Congress in its further deliberations, we will describe several alternative definitions that have been presented.

190. The Commission believes there are several possible ways to measure effective competition and that the appropriateness of using a particular standard may depend on the circumstances of the particular cable community involved. In some markets, cable derives its market power from its ability to provide a diversity of programming directly to consumers in one convenient package. In other cases, cable's market power is due to its ability to provide good reception of over-the-air signals. Thus, no single standard of effective competition can be expected, in every case, to measure the source and extent of a cable system's market power. An effective competition standard composed of several alternative definitions, therefore, may well permit a better way to consider various local circumstances.

191. While no final determinations have been made by the Commission at this point, several alternatives are under consideration.[230] One proposal

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by local franchising authorities in cable communities not subject to effective competition should be amended.

229 We note that the Senate Commerce Committee already has approved a cable bill (S. 1880) that established specific thresholds for the presence of effective competition. Also, the House Commerce Committee has under consideration a cable bill (H.R. 5267) that would eliminate the need for a definition of "effective competition."

230 The first three of these proposals described below are derived from comments submitted in the record of this proceeding. The fourth, the "competitive package" alternative, has been developed internally by Commission staff.

would simply increase the number of over-the-air signals required to constitute effective competition. Another includes a combination of a certain number of over-the-air broadcast signals (more that the current three-signal standard), coupled with a cable penetration rate significantly lower than the current national penetration average. A third alternative definition would be the existence of a competing multichannel video delivery system in the cable community which passes a stated percentage of households and is subscribed to by a stated percentage of those passed. A fourth alternative, featuring a behavioral or "good" actor test, would presume the existence of effective competition wherever a cable system offered a "competitive package" of basic cable service consisting of a minimum number of channels at or below a specified range of prices or price increases.[231]

192. As stated previously, out of deference to the ongoing legislative process we decline to take further steps to adopt revised effective competition standards at this time or to specify in any detail the potential alternatives. However, if Congress does not enact statutory changes to the rate regulation provisions of the Cable Act in this legislative session, we intend to move expeditiously to determine an appropriate effective competition definition.

193. With regard to the ratemaking process applicable where effective competition does not exist, it is our view that federal standards should guide local ratemaking to assure that nonfederal power is exercised reasonably, but the process of rate regulation should be left to municipalities or states. Bifurcation of the standard-setting and rate-setting process between federal and nonfederal jurisdictions will best assure that the regulatory interests of each will be met.

194. It is important to address one last aspect of the effective competition/rate regulation issue: the impact of currently pending legislation that would require the Commission to establish and administer rate regulation standards set by the approximately 27,000 franchising authorities regulating 9,600 cable systems. The Federal Communications Commission, as the chief body charged with enforcing the laws and regulations affecting communications, must command the resources and people necessary to carry out the tasks imposed upon it by Congress. If not, its machinery will soon be overwhelmed, its authority eroded, and its credibility as a regulatory agency seriously compromised. It is both logical and necessary therefore, in our judgment, for the Congress to consider, along with currently pending cable legislation, appropriating sufficient funds to cover the costs they impose. Alternatively, we recommend that Congress consider enacting a fee program that

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231 We wish to emphasize, however, that we will consider these and other possible alternatives only if the 101st Congress fails to act.

will allow the Commission to recoup the costs of any increased regulatory responsibilities that Congress would have us assume.

B. Service Regulation

195. In the following subsections, we discuss our conclusions and recommendations for addressing the problems related to service quality discussed above in Section II-B.

1. Technical Cable Service

196. Background. Since 1972, the Commission has had technical standards to govern the video signal of cable channels retransmitting broadcast programming (i.e., "class I" channels). At the outset, the Commission also permitted local franchise authorities to adopt and enforce stricter cable technical standards than the ones it promulgated. This resulted in a variety of different standards adopted by local authorities, which created a significant degree of confusion and inefficiency. Consequently, in 1974 the Commission preempted the authority of state and local governments to set more stringent standards than the Commission. Until 1985, the Commission itself enforced these standards. At that time, however, the Commission decided that it would no longer enforce the standards, but would retain them as voluntary guidelines that local authorities could include as requirements in their franchise agreements and could themselves enforce.[232] The Commission's preemption of local authority in this area remained in effect.

197. Although the Commission initially anticipated setting additional standards for class II, III and IV channels as the need developed, it ultimately determined that standards for class II through IV channels would stifle the development of services using these channels, and that competitive forces would be a far more effective regulator of service quality for these channels.[233] The Commission therefore did not adopt any standards or guidelines for class II through IV channels, and, to ensure that technical innovation proceeded without unnecessary impediment, the Commission also preempted local authorities from imposing any technical standards for these channels.

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232 See Report and Order in MM Docket No. 85-38, 102 FCC 2d 1372 (1985).

233 See Report and Order in MM Docket No. 85-38, 102 FCC 2d at 1372-73, n.2; cf. Notice of Inquiry and Proposed Rulemaking in Gen. Docket No. 83-114, 48 FR 14399 (April 4, 1983) (concluding that when communications services are sufficiently competitive, government-mandated technical quality standards are unwarranted).

198. In 1985, the Commission again declined to set standards (or guidelines) for class II through IV cable channels and continued to preempt local franchising authorities from doing so. Franchising authorities appealed the decision, arguing that this preemption, coupled with the absence of federal quality standards for these channels, made it impossible for them to perform an adequate analysis of whether a franchise should be renewed, in accordance with their obligations under the Cable Act. Finding merit in this argument, the Court of Appeals for the District of Columbia Circuit remanded the case to the Commission. Responding to the remand, the Commission launched a further rulemaking proceeding, proposing to extend the now voluntary technical guidelines for video signals carried on class I cable channels to cover video signals carried on class II and class III channels.[234] The Commission believed that the varied and experimental nature of non-video services carried on class III and class IV channels made defining standards for these channels difficult, if not impossible. It also stated its continuing concern that such standards would stifle further development of new uses of cable technology. Consequently, no standards were proposed for non-video signals carried on class III and IV channels.

199. Findings. While we anticipated that our class I guidelines, coupled with the pressure of the marketplace, would assure that cable subscribers receive a consistently high quality picture signal for both cablecast and broadcast signals, this does not appear to have occurred throughout the industry. Moreover, the existing class I channel standards, which have not been revised since the early 1970s, do not even address some technical problems. Thus, we find merit in the criticism of some municipal commenters that the standards are outdated and inadequate to assure subscribers a high quality picture.

200. Conclusions. We continue to believe that uniformity of technical standards in the 27,000 communities with cable franchises is essential to prevent the inefficiency and confusion that threatened the cable industry during the period when local authorities (far fewer at that time) could set stricter standards than those promulgated by the Commission. Moreover, uniform standards would permit cable operators, program suppliers and equipment manufacturers to take advantage of any economies of scale that might otherwise be lost if differing technical standards force them to customize their services or equipment to meet the requirements of a myriad of jurisdictions. As the cities themselves recognize, federal standard setting could also save the local authorities the expense associated with developing their own standards. The evidence presented by NYC/NLC concerning technical service problems (discussed above in Section II-B) suggests that at least some

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234 Further Notice of Proposed Rule Making in MM Docket No. 85-38, 3 FCC Rcd 5966 (1988).

cable operators now lack a strong incentive to provide a technically high quality service.

201. This analysis applies to the video signals carried on class I, II and III cable channels. The number of variations in the nature and types of non-video services offered on class III and class IV channels would make it difficult to develop uniform standards for those services at this time. Such standards could also stifle the continuing experimentation and innovation that has taken place in connection with these services, which the Commission has traditionally sought to foster.

202. As stated by the Court of Appeals, our existing approach toward technical regulation prevents local authorities from meeting their obligations imposed by the Cable Act's franchise renewal provisions. At present, local authorities are left without any effective means to redress technical problems that are occurring on class II, III and IV cable channels. Moreover, adoption of technical standards would let cable operators know the benchmarks against which the quality of their signals will be measured in determining whether they are fulfilling their franchise obligations. Additionally, the lack of recourse in cases where a cable system provides poor technical quality service harms consumers and must therefore be corrected.

203. As stated in our findings above, uniform federal technical standards appear advisable for video transmissions carried on the class I through III channels, but not for non-video transmissions (which are carried on class III and IV channels). We do not, however, believe that an absence of federal standards for non-video transmissions will prevent local authorities from fulfilling their obligations under the Cable Act; technical standards for video transmissions should be adequate to enable a franchising authority to determine whether the signal quality of its franchisee's system overall merits franchise renewal. Thus, these standards should provide local authorities with an adequate benchmark for judging franchisee performance for renewal purposes and thus for ensuring that their franchisees provide a reasonable degree of technical quality service to subscribers. In order that any standards adopted do not inadvertently stifle technological advances and experimentation, however, it is important that such standards be limited to those fundamental service aspects capable of assuring reasonable technical quality to all subscribers. New federal standards should not impose new costs on the cable industry that outweigh benefits to the consumer.

204. Establishing new uniform technical standards for the video component of class I through III cable channels will require the continued preemption of local standards for this component that are more stringent than those the Commission ultimately promulgates. The potential benefits flowing from experimentation and innovation also justify continued preemption of local authorities' power to set technical standards for non-video signals carried on class III channels. The case in favor of preemption is more difficult to make for class IV channel signals. In some systems, class IV channels may be used for separate institutional networks that are not interconnected with the cable

operator's broadcast and cablecast channels. Moreover, at least some of the channels may be used for intrastate private carrier or common carrier services, over which the Commission's jurisdiction is at best questionable. Consequently, whether we should preempt local authorities from setting technical quality standards for transmissions over these channels is a question best answered on a case-by-case basis. Preemption would be warranted only in those cases in which local regulation would prevent the Commission from fulfilling its obligations under the Communications Act.

205. Recommendations. Efforts are being made in various quarters to address customer dissatisfaction with the technical quality of cable service. Congress is weighing legislation, for example, that would increase the cable industry's obligations in this area. Some local authorities have attempted to raise the level of cable service by negotiating for higher technical standards in their franchise agreements. The cable industry itself has made efforts to reach an inter-industry consensus on new technical standards. Currently, NCTA, NYC/NLC and the National Association of Telecommunications Officers and Administrators ("NATOA") are working together to develop a new set of cable technical standards acceptable to all.

206. We believe that the best way to fashion effective technical standards is to involve the interested parties, including the cable industry and franchising authorities, by encouraging the completion of the ongoing inter-industry negotiations in this area.[235] Thus, we will initiate an inter-industry advisory process, geared toward reaching consensus for revamping the specific standards for cable technical regulation, within the following framework:

(a) The Commission intends to adopt mandatory technical standards for class I, II and III video signals.

(b) The Commission will continue to preempt the power of local authorities to set technical standards for these signals more strict than the federally established ones.

(c) As a practical matter, the Commission will continue to rely on local franchising authorities as the first line of enforcement; with mandatory standards, however, the Commission will have enforcement responsibilities.

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235 In the past, the Commission has met with great success using this type of approach. For example, in an effort to improve the quality of the AM radio service, the Commission acted on a recommendation by the National Radio Systems Committee to adopt a new emissions standard for AM stations.

(d) For non-video transmissions carried on class III and IV channels, technical standards, to the extent they are necessary, should not be so restrictive as to stifle innovation and experimentation in this dynamically evolving area of new technology and service.

Once a consensus agreement is reached among the interested parties, the Commission will issue a notice of proposed rule making setting forth and seeking comment on the proposed set of additional federal standards.

2. Nontechnical Cable Service

207. Background. Section 632 of the Cable Act, 47 U.S.C. § 552, provides that a franchising authority may require, as part of the franchise contract, provisions for the enforcement of customer service requirements. Several commenters argue that, as a practical matter, local authorities generally do not attempt to enforce nontechnical standards until the operator seeks renewal of its franchise. More likely, they argue, enforcement is foregone entirely because the Act makes it difficult for a local authority to deny renewal.[236] Moreover, they submit that the Act limits the ability of the local authority to deny requests for modifications of the franchise agreement. They also assert that customer service provisions included in a franchise agreement are often unenforceable due to the operator's request for modification based on commercial impracticability. In addition, at least one court has held that a request for modification of the franchise agreement stays the imposition of any penalties pursuant to that agreement, regardless of when they accrued.[237] Commenters finally note that well-financed cable operators have the resources to prolong litigation beyond the means of the local authority.

208. Findings. As discussed above in Section II-B, there is a pattern of nontechnical service problems, including telephone and billing difficulties and inadequate response to repair requests. The industry has recently launched efforts to deal with such customer service problems. Local franchising authorities have little power to address such service problems, notwithstanding the authority afforded them by Section 632, as their only recourse is the undesirable and often ineffective option of taking the cable operator to court for breach of the franchise agreement.

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236 The need or basis for this reaction is a subject of considerable debate among commenters.

237 Tribune-United Cable of Montgomery County v. Montgomery County, et al., 784 F.2d 1227 (4th Cir. 1986).

209. Conclusions. The emergence of more robust competition will in all likelihood, lead to improved customer service.[238] In the meantime, because we believe that the local franchising authority is the best arbiter of the particular customer service requirements of its community, promulgation of such standards is best left to those local authorities, as is currently dictated by the Act. This leaves parties free to negotiate nontechnical safeguards which account for conditions specific to the local community. Local control of customer service standards provides aggrieved customers with a forum other than the cable company or a distant (federal) governmental entity with which to lodge complaints, and empowers the local authority to act on those complaints.

210. Recommendations. We recommend that Congress clarify the consumer protection provisions of the Cable Act to enable local authorities to effectively implement their existing powers. Because Congress clearly intended Section 632 to enhance rather than inhibit the local authorities' enforcement of consumer protection standards, we recommend that Congress clarify the rights and limitations of franchising authorities under Section 632. Particularly, we recommend that Congress permit local franchising authorities to impose penalties for customer service violations by expressly allowing them to impose penalties for violations thereof at any time in the life of the franchise.

VI. CONCLUSION

211. In compiling and analyzing the record leading to this Report, we have found that since the Cable Act of 1984, the cable television industry and cable television subscribers have benefited significantly from the regulatory certainty and economic freedoms contained in the Act. Cable operators have expanded their systems -- both in terms of service area and channel capacity -- deployed new technology and invested in new programming, thereby increasing choices for consumers. The Cable Act was intended to establish a national policy concerning cable communications that would promote competition, minimize unnecessary regulations imposing undue economic burdens on cable systems, and encourage the provision of the widest possible diversity of information sources and services to the public. In many respects these fundamental purposes of the Cable Act are being accomplished.

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238 In Section IV-C, above, we recommended removing some aspects of the franchise process from the purview of the local authority so as to foster the development of competition. Here, we see no reason to curtail the authority of the local franchising body, since the present rule does not affect entry into the cable marketplace.

212. While the dramatic growth and development of the cable industry has benefited the American public, many cable subscribers and local officials have expressed alarm about the substantial rate increases that accompanied this growth and the poor quality of technical and consumer service some subscribers have experienced. Also, existing and emerging competitors to cable have alleged that increasing concentration of ownership and vertical integration within the industry have resulted in anticompetitive conduct by cable operators and programmers.

213. It is, we believe, in the national interest to foster, for the future, a domestic video distribution system which ensures the benefits that cable television offers, but which does not unfairly disadvantage competitors.

214. This Report finds that robust competition in the video marketplace has not yet developed but is emerging. In light of the developing field of existing and potential multichannel competitors to cable, and evidence that even direct competition between cable operators may increasingly occur, we do not recommend any drastic or long-term reregulation of cable rates and services. Therefore, the proposed actions and recommendations to Congress set forth in this Report are designed to eliminate market restraints and enhance the prospect for competition rather than to reregulate the cable industry. Consequently, they are targeted and limited and should become largely unnecessary once full-fledged multichannel competition develops.

215. As with other mass media, television is best at contributing to the marketplace of ideas when there is vigorous competition -- competition in ideas and for viewers. The recommendations outlined in this Report are designed to foster a video distribution marketplace that will ensure the benefits of competition.

ORDERING CLAUSE

216. IT IS ORDERED that the Secretary shall send copies of this Report to the appropriate committees and subcommittees of the United States House of Representatives and the United States Senate.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

LIST OF COMMENTERS

Comments

1. Action For Children's Television
2. Adelphia Communications Corporation, et al.
3. Ameritech Operating Companies
4. Arkansas Public Service Commission
5. Association Of Independent Television Stations, Inc.
6. Steve & Lorraine Augustyn
7. Baltimore City Mayor's Office Of Cable & Communications
8. Bellsouth Corporation
9. Joseph S. Broadman
10. Cable Television Operators & Associations
11. Cable TV Consumers
12. Cablevision Systems Corporation
13. Capitol Cablevision
14. CBS Inc.
15. Center For Communication's Cable Access Project
16. Channel America LPTV Holdings, Inc.
17. Charter Township Of Milford
18. Chris-Craft Industries, Inc./United Television, Inc.
19. Chula Vista Cable, Ultronics
20. City Of Beverly Hills, California
21. City Of Brentwood, Tennessee
22. City Of Burnsville and Eagan, Minnesota
23. City And County Of Denver
24. City Of Dubuque, Iowa, Montgomery County, Maryland, and The City Of St. Louis, Missouri
25. City Of Eau Claire, Wisconsin
26. City Of Fort Lauderdale, Florida
27. City Of Fort Worth, Texas
28. City Of Hattiesburg, Mississippi
29. City Of Hawthorne, California
30. City Of Issaquah, Washington
31. City Of Kearney, Nebraska
32. City Of Lakeville, Minnesota
33. City Of Longview, Texas
34. City Of Los Angeles, California
35. City Of Mesa, Arizona
36. City Of Minden, Nebraska
37. City Of Natchitoches, Louisiana
38. City Of New York, National League Of Cities, United States Conference Of Mayors, City Of Huntsville, Alabama, City Of Portland, Oregon and Northwest Municipal Cable Council

39. City Of Olathe, Kansas
40. City Of Olivette, Missouri
41. City Of Palo Alto, California
42. City Of Peoria, Arizona
43. City Of Portsmouth, Virginia
44. City Of Redondo Beach, California
45. City Of Rochester, Minnesota
46. City Of San Diego, California
47. City Of Santa Ana, California
48. City Of Schuyler, Nebraska
49. City Of St. Louis Park, Minnesota
50. City Of Sunnyvale, California
51. City Of Tallahassee, Florida
52. City Of Thousand Oaks, California
53. City Of Torrance, California
54. Community Antenna Television Association
55. Competitive Cable Association
56. Connecticut Cable Television Association
57. Consumers Against Cable Monopolies
58. Contel Corporation
59. Continental Cablevision, Inc.
60. Contra Costa County
61. Joseph Conway
62. Tom Cunningham
63. Deridder Cable TV
64. ESPN Inc.
65. Fairfax County, Virginia
66. Fisher Broadcasting Inc.
67. Florida Public Service Commission
68. Glenn A. Grago
69. GTE Telephone Companies, GTE Service Corp., and GTE Laboratories
70. Guam Cable
71. Hope C. Hardin
72. Harte Hanks Television, Inc. (Kens 5 TV)
73. Heritage Communications, Inc.
74. Hillsborough County, Florida
75. Hughes Communications Galaxy, Inc.
76. Illinois Cable Television Association
77. Intermedia Partners and Intermedia Partners II, L.P.
78. Ka'ikena Lani TV Corporation
79. Kings Bay Communications, Inc.
80. Latino Community Justice Center, Los Angeles, California
81. Richard S. Leghorn
82. The Lenfest Group
83. Major League Baseball
84. Massachusetts Community Antenna Television Commission
85. Massillon Cable TV and Clear Picture, Inc.

86. Massillon Cable TV, Inc., Cooney Cable Associates Of Ohio, Kings Bay Cablevision, Inc., and Fairmont Cable TV
87. Minnesota Cable Communications Association
88. Monmouth Cablevision Associates
89. Motion Picture Association Of America, Inc.
90. Natchitoches Cable TV
91. National Association Of Broadcasters
92. National Association Of Public Television Stations
93. National Association Of Regulatory Utility Commissioners
94. National Cable Television Association, Inc.
95. National Private Cable Association
96. National Rural Telecommunication Cooperative
97. National Satellite Programming Network, Inc., et al.
98. National Telecommunications and Information Administration
99. Navy Broadcasting Service
100. Netlink USA
101. New Milford Cablevision Company, Housatonic Cablevision Company, and Mid-Connecticut Cablevision Company
102. Newhouse Broadcasting Corporation
103. The 97 Television Stations
104. Sylvia Chan-Olmsted
105. Orange County Cable Operators
106. Otec Communication Company
107. Pappas Telecasting Inc.
108 Paragon Cable
109. Barry Pineless
110. Post-Newsweek Cable
111. Prime Cable
112. Public Broadcasting Service
113. Public Service Commission Of The District Of Columbia
114. QVC Network, Inc.
115. Scientific Atlanta
116. Charles D. Sneed
117. Southern Cable Group, Inc.
118. Southwest Missouri Cable TV, Inc.
119. Southwestern Bell Corporation
120. Spectradyne
121. St. Mary's TV, Inc.
122. State Of Hawaii
123. Joe Stein
124. Jerry L. Stockton
125. Tele-Communications, Inc.
126. Telecommunications Industry Association
127. Telemundo Group, Inc.
128. Telesat Cablevision, Inc.
129. Time Warner, Inc.
130. TKR Cable Company
131. Mary O. Torres
132. Turner Broadcasting System, Inc.
133. TVX Broadcast Group, Inc.

134. United States Catholic Conference
135. United States Telephone Association
136. United Telecommunications, Inc.
137. University Of Tennessee, Municipal Technical Advisory Service
138. USA Network
139. Village Of Dodge, Nebraska
140. Lawrence R. Walz
141. Charles R. Wells
142. WGXA-TV 24
143. Wireless Cable Association, Inc.
144. Mark A. Zupan

Comments (late-filed)

1. American Cablecom, L.P.
2. Cencom Cable Associates
3. Charter Township Of White Lake, Michigan
4. City Of Albion, Nebraska
5. City Of Beverly Hills, California
6. City Of Bloomington, Minnesota
7. City Of Cupertino, Cupertino Cable Television Advisory Committee
8. City Of Daly City, California
9. City Of Danville, Virginia
10. City Of Fremont, Nebraska
11. City Of Germantown, Tennessee
12. City Of Humphrey, Nebraska
13. City Of La Mesa, California
14. City Of Leesburg, Florida
15. City Of Minneapolis, Minnesota
16. City Of Oceanside, California
17. City Of Palm Desert, California
18. City Of Schertz, Texas
19. County Of Los Angeles, Internal Services Department
20. Sam Dana
21. Federal Trade Commission
22. Fireweed Television
23. Grassroots Cable Systems, Inc.
24. Jack Hooper
25. Kootenai Cable Inc.
26 The Lenfest Group
27. John P. Liston
28. Litchfield Country Club Property Owners' Association, Inc.
29. John Mock
30. New York State Commission On Cable Television
31. Omaha City Council
32. James C. Reed
33. Sioux Valley Rural Television Cooperative, Inc.
34. Town Of Grove Hill, Alabama

35. Township Of Alpena, Michigan
36. U.S. Dept. Of Commerce
37. Village Of Wolverine Lake, Michigan
38. Huson A. Wilken

Reply Comments

1. American Telecasting, Inc.
2. Bell Atlantic Telephone Companies
3. Bellsouth Corporation
4. Blackstar Communications, Inc., Roberts Broadcasting Company and Home Shopping Network, Inc.
5. C-Sat Committee Of 435
6. Cable Television Operators and Associations
7. Cablevision Systems Corporation
8. Cacomm, Inc.
9. City Of Boston, Massachusetts
10. City Of Dubuque, Iowa
11. City Of Los Angeles, California
12. City Of New York, The National League Of Cities, The United States Conference Of Mayors, The City Of Huntsville, Alabama, The City Of Portland, Oregon and The Northwest Municipal Cable Council
13. Clear-Vu Cable, Inc.
14. Comcast Cablevision Of Santa Ana, Inc.
15. Concord TV Cable
16. Consumer Federation Of America, Office Of Communication Of The United Church Of Christ, Telecommunications Research and Action Center
17. Continental Cablevision Of Western New England, Inc.
18. Corporation For Public Broadcasting
19. Eastern Microwave, Inc.
20. Bruce L. Egan and Douglas A. Conn
21. ESPN, Inc.
22. Fairfax County, Virginia
23. Gateway Cable
24. General Instrument Corporation
25. GTE
26. Guahan Airwaves, Inc.
27. Hughes Communications Galaxy, Inc.
28. Illinois Cable Television Association
29. International Family Entertainment, Inc.
30. Longview Cable Television Company
31. Magnavision, Inc.
32. Major League Baseball
33. Maricopa County Highway Department
34. Mark S. Nadel
35. National Association Of Broadcasters
36. National Association Of Public Television Stations

37. National Basketball Association and National Hockey League
38. National Broadcasting Company, Inc.
39. National Cable Television Association, Inc.
40. National Private Cable Association
41. National Rural Telecommunications Cooperative
42. National Satellite Programming Network, Inc., et. al.
43. National Telecommunications and Information Administration
44. Network Affiliated Stations Initiative
45. New England Cable Television Association
46. New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
47. News Corporation Limited
48. Northwest Municipal Cable Council
49. Northwest Suburbs Cable Communications Commission, et. al.
50. Office Of Communication, United Church Of Christ; Communication Unit, National Council Of Churches Of Christ In The U.S.A.; and National Federation Of Local Cable Programmers
51. Organization For The Protection and Advancement Of Small Telephone Companies
52. Pacific West Cable Television
53. People's Choice TV
54. Sacramento Metropolitan Cable Television Commission
55. Satellite Broadcasting and Communications Association Of America
56. Selkirk Communications, Inc.
57. Southern Satellite Systems, Inc.
58. Tele-Communications, Inc.
59. Telesat Cablevision, Inc.
60. Time Warner Inc.
61. Turner Broadcasting System, Inc.
62. United Cable Television Of Baltimore, L.P.
63. United States Department Of Justice
64. United States Telephone Association
65. United Video, Inc.
66. Village Of Buffalo Grove, et al.
67. Wireless Cable Association, Inc.
68. WWOR-TV, Inc.

Reply Comments (late-filed)

1. Association Of Independent Television Stations, Inc.

APPENDIX B

LIST OF 9 MSOs RESPONDING TO COMMISSION REQUESTS FOR INFORMATION

1. American Television and Communications Corporation
2. Cablevision Systems Corporation
3. Comcast Corporation
4. Continental Cablevision, Inc.
5. Cox Communications, Inc.
6. NewChannels Corporation
7. Sumner Redstone, National Amusements, Inc., Viacom, Inc., Viacom International, Inc. and subsidiaries ("Viacom")
8. Tele-Communications, Inc.
9. Warner Cable Communications, Inc.

APPENDIX C

PARTIES PROVIDING RESPONSES TO COMMISSION'S FOLLOW UP QUESTIONS TO FIELD HEARINGS

1. American Television and Communications Corporation
2. Blackstar Communications, Inc.
3. Cable Television Laboratories
4. Cablevision Industries
5. City of Leesburg, Florida
6. Communications Support Corporation
7. Continental Cablevision, Inc.
8. Cosmos Broadcasting Corporation
9. Cross Country Cable, Inc.
10. Glasgow Electric Plant Board
11. KBHK-TV Channel 44
12. Missouri Public Service Commission
13. Multimedia Cablevision
14. National Cable Television Cooperative, Inc.
15. North Carolina Utilities Commission
16. Paramount Communications, Inc.
17. Product & Technology Planning
18. St. Louis County Missouri
19. Supreme Cable Company, Inc.
20. Tele-Communications, Inc.
21. Telemundo Group, Inc.
22. Telesat Cablevision, Inc.
23. Times Mirror Cable Television
24. Universal Television Corporation
25. Walt Disney Television
26. Warner Brothers
27. Weier, Hockensmith & Sherby
28. WLRN-TV and FM
29. WUFT-TV/FM

APPENDIX D

PARTIES RESPONDING TO COMMISSION REQUESTS FOR ADDITIONAL INFORMATION

1. Turner Broadcasting System, Inc.
2. Wireless Cable Association, Inc.

APPENDIX E

STATISTICAL EVIDENCE OF CABLE MARKET POWER: A MORE DETAILED ANALYSIS OF THE STUDIES SUBMITTED

1. This appendix provides a more comprehensive discussion of the q ratio studies and the regression analysis studies that were submitted in response to the Notice and also those submitted in the Effective Competition proceeding. The first part of the appendix addresses the q ratio studies, while the second addresses the regression analyses of the effects of broadcast signal availability on cable rates and on the market value per subscriber of cable systems.

I. The q Ratio

2. The q ratio is defined as the ratio of the market value of a firm to the replacement costs of its assets. Industry-wide or economy-wide q ratios can also be calculated. The q ratio was originally developed as a tool to analyze investment decisions. However, it has also been appropriately used to measure market power. Although there are important measurement problems associated with applying the q ratio, it is widely accepted as a useful measure.

3. The mechanics of the q ratio may be illustrated by a simple, hypothetical example. Consider an asset called a "fountain." The market value of one fountain is $100 -- that is, willing buyers are offering $100 in exchange for a fountain. Buyers base their valuation of a fountain on the stream of income it generates. Suppose that a fountain can be constructed from raw materials for total cost, including labor, of $50. Assuming that the market information about fountains is widely known, investors would likely channel funds into fountain production. The increased supply would, other things equal, drive down the price of fountains. When the price reached $50, then people would stop building new fountains.

4. Suppose now that one ingredient of fountains, call it "marble," is in limited supply. Suppose further that the cost of all the other ingredients of fountains is $45 and the cost of marble, when it is available, is $5. It is possible that all of the available marble will run out before the price of fountains has fallen to $50. In this situation, the equilibrium price of fountains will not fall to $50.

5. One additional refinement will complete the illustration. The equilibrium price of fountains, $50 in the first instance, is determined by the amount of money earned by virtue of ownership of a fountain. Suppose that investors are not certain of that amount of money, which, after all, accrues over a period of time in the future. Perhaps, even though the expected value of a fountain is $50, investors know that there is a chance,

albeit very small, that the fountain will be worth only $5. To compensate for that risk, the equilibrium price per fountain may be more than $50.

6. Assuming no scarce resources and risk, however, if the price of fountains were to persist at a level significantly above $50, two conclusions could be drawn. First, fountain owners would be reaping excess profits. Second, there must be some impediment (in economic parlance, a "barrier to entry") to the production of additional fountains or other assets that are close substitutes for them.

7. The preceding example is intended to illustrate the point that, in a competitive industry that is in equilibrium, the q ratio, properly calculated, should equal 1.0. If it is greater than 1.0 (i.e., if the market value is greater than the replacement cost), someone would find it profitable to enter the market. The additional quantity supplied of fountains would cause the price of fountains to fall. Thus, the market value of fountains would fall, the replacement cost would be unchanged, and the q ratio would drop. When the q ratio reached 1.0, no additional entry would be profitable. However, if there are barriers to entry, the incumbent firm or firms will continue to earn economic profits and the q ratio will remain above 1.0.[1] Moreover, if the incumbent firm controls a scarce resource such as a license to use the radio spectrum, the q ratio may also remain above 1.0.[2]

8. Thus, the general procedure for using the q ratio to assess the presence of market power is to estimate the market value of the firm or industry in question, estimate the replacement cost of the relevant assets of that firm or industry, divide the former by the latter, and compare the resulting ratio to the critical value of 1.0. As described below, however, one widely used method of estimating market value involves calculating the

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1 In this context, "economic profits" include profits that cable operators may earn due to market power in the program acquisition market, or "monopsony power." When sellers of a product or service face only one possible buyer, the buyer is said to have monopsony power. In its review of the q ratio studies submitted in the cable inquiry, the Department of Justice concludes that there is little evidence of monopsony power, so any cable market power revealed by the q ratio analyses is attributable to cable's local distribution position. See Reply Comments of the United States Department of Justice, filed April 2, 1990 ("Justice Reply Comments") at 21. But see discussion in paras. 85, 88, and 125 of this Report.

2 As discussed below, superior management may also be a scarce resource.

total value of the firm's equity. Because stock prices can be quite volatile for reasons unrelated to market power,[3] the aggregate q ratio for all nonfinancial corporations in the economy is sometimes calculated as an alternative critical value. Comparison to this q ratio presumably controls for any economy-wide factors that might cause the general level of stock prices to fluctuate.

9. Paul MacAvoy submitted a comprehensive q ratio analysis on behalf of the United States Telephone Association.[4] His "best estimate" of q for cable as of September 30, 1989 is 4.3. This estimate is based on a calculated market value of $1698 per subscriber and a replacement cost of tangible assets of $395 per subscriber. For comparison, MacAvoy computes the q ratio for all nonfinancial corporations. That ratio is 0.89. The computation of both the numerator and denominator of the cable television q ratio and the computation of the economywide q ratio are all subject to criticism, as detailed below. Nevertheless, even if all of the assumptions of the analysis were altered to reflect more closely the position of the cable industry, the analysis would still demonstrate the existence of some cable market power.[5]

10. Again for purposes of comparison, MacAvoy also calculates q ratios for broadcast companies and for the seven Regional Bell Operating Companies

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3 See Grossman, Sanford J. "On the Misuse of Tobin's Q to Measure Monopoly Power." Attachment to Comments of the National Cable Television Association, Inc., filed March 1, 1990, p. 9. Comments of Adelphia Communications Corporation et al., filed March 1, 1990, p. 56. Crandall, Robert W. "Vertical Integration and q Ratios in the Cable Industry." Attachment 1 to Reply Comments of Tele-Communications, Inc., filed April 2, 1990, p. 27 ("Crandall Reply Statement").

4 See Comments of the United States Telephone Association, filed March 1, 1990 ("USTA Comments"); Appendix 5: "Tobin's q and the Cable Industry's Market Power," by Paul W. MacAvoy ("MacAvoy Statement").

5 See Justice Reply Comments at 23. MacAvoy uses his estimates to calculate the replacement cost of tangible assets for the entire cable industry and the market value of the entire cable industry. By subtracting the former from the latter, he derives an estimate of capitalized monoply profits of $63 billion for the industry. Because the precise magnitude of the cable television q ratio is subject to significant uncertainty, the magnitude of this figure should not receive undue emphasis. Moreover, it is worth noting that, even if one were confident of the market value and replacement cost estimates, additional assumptions and a substantial amount of additional analysis would be needed to translate the findings into information about how far cable rates diverge from the competitive level.

and GTE. For a sample of nine broadcasting companies, he finds q ratios ranging from 0.9 to 3.6, with a weighted average of 2.1. This average is below the cable industry q ratio. Moreover, the market value of the broadcasting companies presumably reflects the "scarcity rents" that they earn on the broadcast spectrum for which they are licensed. The telephone company q ratios range from 1.1 to 1.3, with a weighted average of 1.2. MacAvoy notes that some of these firms have cellular telephone subsidiaries, which, due to their control of scarce spectrum, are likely to have high q ratios. The implication is that, for the traditional local exchange telephone services, these firms exhibit q ratios close to 1.0. Presumably this reflects their status as regulated utilities. Comparisons between these q ratios and those for cable are of little utility.[6]

11. MacAvoy's preferred q ratio estimate of 4.3 employs a market value per subscriber of cable systems based on a sample of five multiple system operators (MSOs). The sample is small because it was necessary to limit it to publicly traded firms that are only in the business of operating cable systems. For these firms, the market value on a particular day of their outstanding common stock is added to the book value of debt and preferred

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6 William B. Shew, in a study submitted on behalf of Time Warner, Inc., presents estimates of the q ratio for cable television, for television broadcast stations, for FM radio stations, and for cellular telephone. Shew's study is based on selling prices of these properties in 1986, 1987, and 1989. (MacAvoy used selling prices of cable systems for some of his estimates, but not for the preferred ones.) He finds average q ratios of 4.3, 4.6, 7.8, and 9.9 for cable, television, FM, and cellular, respectively. For cellular, only 1989 data are available. However, since Shew does not take the use of spectrum by the other industries into account, his figures do not provide a useful benchmark for comparison. See Reply Comments of Time Warner Inc., filed April 2, 1990, Appendix A: "Tobins's Q for Cable Television, Media and Telecommunications: A Comparative Assessment," by William B. Shew.

stock.[7] The replacement cost is based on the adjusted book value of tangible assets for these firms.

12. One reason that the q ratio may exceed 1.0 is superior management. Superior management may be thought of as a scarce resource, one that enhances the market value of the firm, but is not reflected in replacement costs based on book value of tangible assets.[8] One critique of the MacAvoy analysis points out that the five firms used account for less than 11 percent of total cable subscribers and that those firms grew significantly faster than the industry as a whole between 1985 and 1989.[9] These

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7 MacAvoy refers to this as the "public" market value. An alternative concept is the "private" market value, which is based on the price at which cable systems have recently sold. MacAvoy estimates market value both ways, but uses public market value, which is significantly lower than private market value, in his preferred estimates. He notes that "the reasons why public and private values differ so greatly is not well understood. There may be an element of excessive payment when a competing bidding process breaks out. Alternatively, the acquiring firm may believe that it can introduce cost-reducing programs so as to increase the acquired firm's profits, and has to share these increased profits with the stockholders of the acquired firm in competition with other bidders." MacAvoy Statement at 27-28. Daniels, a major cable system broker, recently announced that the average per subscriber price of cable system sales that it closed in the first half of 1990 was $2200. See Communications Daily, July 3, 1990, p. 7. Morgan Stanley & Co. figures for the first three quarters of 1989 show per subscriber selling prices for cable systems in the $2250-$2500 range. Morgan Stanley & Co., Media & Communications Report 1990 (199), p. 128.

8 The conclusion that superior management enhances the market value of the firm is based on the assumption that superior managers do not capture for themselves all of the returns to their skills. If all of the increase in firm profits attributable to superior management was paid out in managerial salaries, then such management skills would raise the market value of the managers rather than the firm. Because some management skills and experience are firm-specific, though, it is reasonable to assume that some of the returns to management skills are captured by the firm.

9 Moreover, one firm, ATC (a Time Warner subsidiary), accounts for almost three quarters of the five firms' total subscribers. See Crandall Reply Statement at 22-25.

observations are at least consistent with the hypothesis that these firms were better managed than average. Thus, it is possible that MacAvoy's market value figure of $1698 per subscriber overestimates the average market value per subscriber for the whole industry. It is unlikely, however, that superior management could account for more than a fraction of the value of the q ratio.

13. The Department of Justice observes that the q ratio may also exceed 1.0 in particularly risky industries.[10] Cable may be an industry with above-average risk, since it is characterized by enormous sunk costs of cable plant that has very limited alternative uses in the event that a franchise is not renewed. If the market value of a firm includes a "risk premium," that market value will remain above 1.0.

14. There are also some questions regarding replacement cost estimates. The figure of $395 used in the preferred estimate is below, in some cases significantly, the alternatives MacAvoy and others presented based on engineering models of cable construction costs. These range between $446 and $765.[11] Some data from Continental Cable show a gross book

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10 Justice Reply Comments at 22-23.

11 MacAvoy derives three replacement cost estimates from data on current construction expenditures. They range from $446 to $458. Shooshan and Jackson have also submitted q ratio studies of the cable industry on behalf of USTA. See Appendix to Comments of the United States Telephone Association in CC Docket 87-266: Opening the Broadband Gateway: The Need for Telephone Company Entry Into the Video Services Marketplace," and USTA Comments, Appendix 4: Measuring Cable's Market Power: Recent Developments, which updates the first study. Shooshan and Jackson use an engineering model constructed by Malarkey Taylor Associates, plus book value of tangible assets per subscriber data for 14 firms involved only in the cable business, to derive their replacement cost estimates. Their preferred value of $616 per subscriber is bracketed by "high" and "low" estimates of $765 and $528 per subscriber, respectively. Shooshan and Jackson's updates preferred estimate is $603 per subscriber.

MacAvoy also presents an replacement cost estimate of $466 per subscriber, based on the Shooshan and Jackson figures, which he styles "the FCC's own estimate of cable plant per subscriber." This attribution is not accurate. The calculation to which he refers was an attempt to estimate the portion of basic cable rates that is used to amortize cable plant. It makes use of Shooshan and Jackson's preferred estimate of new plant costs, i.e., $519, removes from it the "drop and install" component on the grounds that this cost is frequently recovered through a one-time installation fee rather than through the monthly basic rate, and alters the Shooshan and Jackson assumption regarding penetration of homes passed. The resulting estimate of

value of capital investment per subscriber of $763.[12] Even after adjustment for depreciation, the figure from this source would be above MacAvoy's preferred value of $395.

15. MacAvoy's estimates of replacement cost only include tangible assets. In his methodological discussion, he asserts that "intangible assets are not relevant for calculating replacement costs since, as purchased "good will," they consist largely of capitalized monopoly profits."[13] Grossman and Crandall each argue that, in some circumstances, intangible assets can be important and should be included in replacement cost estimates.[14]

16. In a supplementary paper filed with USTA's reply comments, MacAvoy agrees that some intangible assets, such as research and development, advertising, and marketing, may be relevant for replacement cost calculations. He suggests, however, that investment by the cable industry in assets of this nature is negligible.[15] It appears that little R&D is done by the industry. Cable interests point out that intensive marketing is needed when a system is being built to create awareness of the product and create and maintain a good reputation for the system.[16] The fact that some cable systems have very poor reputations for service quality does not mean that these factors are irrelevant on an industry-wide basis.

17. As noted above, in addition to a comparison with the theoretical equilibrium value of 1.0, MacAvoy compares cable q ratios to the q ratio for all non-financial corporations. Since stock prices can fluctuate for a

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the per-subscriber cost of new plant is then amortized to a monthly fee based on Shooshan and Jackson's estimate of average cable plant life and an assumed interest rate. See Second Report in Gen. Docket No. 86-336 at note 32. 3 FCC Rcd 1202 (1988).

12 Continental Cablevision Presentation.

13 MacAvoy Statement at 19.

14 See Grossman Statement at 11-12, Crandall Reply Statement at 27-29, and the references cited therein.

15 MacAvoy, Paul W. "Reply to Comments Filed by the National Cable Television Association and Adelphia Communications Corporation, et al." Attachment to Reply Comments of the United States Telephone Association at 16-22 ("MacAvoy Reply Statement").

16 See Crandall Reply Statement at 27-28. See also Reply Comments of Tele-Communications, Inc. in CC Docket 87-226, pp. 13-14.

variety of reasons unrelated to changes in market power, such a comparison is needed to allow for the possibility that, at the time the calculations are made, some economy-wide phenomenon is causing the general level of stock prices to rise and make q values above 1.0. MacAvoy's estimate of the q ratio for all non-financial corporations is 0.89. However, Crandall raises questions about the methodology of those calculations and suggests that they are serious underestimates.[17]

18. Crandall also criticizes MacAvoy's initial study on the grounds that it includes data for only one point in time. He points out that because "q can fluctuate widely, reliable conclusions cannot be drawn from its value for an industry at any one point in time," and cites an estimate by Summers that, in a two day period of October 1987, stock prices rose precipitously enough to cause the q ratio for all non-financial corporations to rise by over 10 percent.[18] With respect to the cable company stock prices used by MacAvoy, Crandall notes that they dropped in value by 21.3 to 61.6 percent between the 1989 date used as a base by MacAvoy and March 30, 1990.[19]

19. In an attachment to USTA's reply comments, MacAvoy recalculates the preferred q ratio as of February 28, 1990.[20] Over the five-month period from September 30, 1989 to February 28, 1990, the q ratio fell to 3.3. This illustrates the volatility of the q ratio, but MacAvoy proffers an explanation for this particular fluctuation and also presents fragmentary data on q ratios for up to 12 cable firms over the 1983-1989 period. He explains the upward trend in q ratios in this period as a consequence of the deregulatory freedom enjoyed by cable operators coupled with the failure of rival distribution systems to develop as fast as originally anticipated. The recent precipitous drop in cable q ratios is attributed primarily to "current political activities which threaten the continued market power of the cable industry." He also notes a drop in the ratio for all

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17 Crandall Reply Statement, pp. 30-32. Crandall points out that in earlier years, there were three time series of aggregate q ratios calculated, but that they have all been discontinued. MacAvoy uses the methodology of one of them, that of Summers, to calculate his aggregate q. Crandall asserts that, for 1960-74, estimates by Tobin and Brainard are 99 to 163 percent higher than Summers' estimates.

18 Id. at 25. This increase in the stock price level followed a major drop on October 17, 1987. On that day alone, stock prices fell by 20 percent. See Grossman Statement, p. 9.

19 Crandall Reply Statement 26.

20 MacAvoy Reply Statement at table 1 and pp. 36-39.

non-financial corporations from 0.89 to 0.85, concluding that economy-wide fluctuations can account for only a small share of the decline in cable q ratios. On the other hand, Morgan Stanley & Co. attributes the fall in cable stocks during this period to "junk bond market woes," in addition to the "threat of reregulation."[21]

20. Clearly the q ratio is sensitive to the assumptions used in constructing it. Nevertheless, while the exact value of the q ratio for the cable industry may be debated, it is clear from the record presented above that, even taking account of various criticisms and adjustments that might be made, the q ratio remains high enough to present an indication of some market power.

II. REGRESSION ANALSYES OF THE IMPACT OF SIGNAL AVAILABILITY ON BASIC CABLE RATES AND MARKET VALUE PER SUBSCRIBER

21. Four of the five regression analysis studies summarized in Section III-A of the Report test for a relationship between basic cable rates and the number of broadcast signals available off-the-air, while the fifth relates signal availability to cable system market value per subscriber.[22] The three rate studies that control for other relevant factors in addition to signal availability establish a statistically significant inverse relationship between basic rates and the number of broadcast signals available, but do not indicate that some particular number of signals is sufficient to constrain rates to competitive levels.[23] The market value per subscriber study indicates that increasing numbers of available broadcast signals constrain the profitability of cable systems.

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21 Morgan Stanley & Co. Media and Communications Report 1990, p. 128.

22 For the cable rate studies, see Appendix A of Comments of National Telecommunications and Information Administration ("NTIA") in MM Docket No. 90-4 (Staff Report, "Competitive Effects of Broadcast Signals on the Price of Basic Service") ("NTIA Staff Report"); Attachment 1 to Comments of TCI in MM Docket No. 90-4 (Crandall, "Regulation, Competition and Cable Performance") ("Crandall Cable Performance Study"); Attachment to Comments of NCTA in MM Docket Nos. 89-600 and 90-4 (Dertouzos and Wildman, "Competitive Effects of Broadcast Signals on Cable") ("Dertouzos and Wildman Study"); Attachment to Comments of NAB in MM Docket No. 90-4 (Ducey and McLean, "The Impact of Off-the-Air Signals on Cable Pricing") ("Ducey and McLean Study"). For the market value per subscriber study, see MacAvoy Reply Statement.

23 The fourth study finds no relationship between the 1986-88 change in basic rates and the 1988 number of broadcast signals available. Because this study suffers from a variety of methodological defects, its results may be safely ignored. See paras. 27-29 below.

22. The NTIA Staff Report estimates the price per basic channel on a sample of cable systems as a function of the number of broadcast signals in the market and other variables. The equations estimated include dummy variables for markets with 4, 5, 6, 7, 8, 9, 10, 11, and greater than 11 broadcast signals. Virtually all of them have statistically significant coefficients. The report concludes that broadcast signal availability does constrain cable rates and that the magnitude of the reduction increases continuously as the number of signals increases. NTIA suggests that six over-the-air signals is the appropriate threshold for constraining basic cable rates.

23. In the Crandall Cable Performance Study, the dependent variable is the monthly basic cable rate. Among the explanatory variables are the number of basic cable networks carried and the number of broadcast signals available in the market. Crandall estimates a series of separate equations, each designed to compare two groups of systems. For example, one equation compares systems with two or more signals available to those with only one signal available. Another compares systems with three or more signals to those with two or fewer. He finds significantly lower basic rates in each case up to and including five or more versus four or fewer signals. Greater numbers of signals are also associated with lower rates, but the effect is not statistically significant.

24. Crandall concludes that broadcast signal availability affects basic rates, but that beyond the threshold level of five signals, there is no additional effect. Because he specified his variables in terms of "x or more" broadcast signals available, Crandall's analysis is less suited than that of the NTIA Staff Report to pinpointing the incremental effect of additional signals on basic rates.

25. The Dertouzos and Wildman Study estimates equations that explain price per channel and other dependent variables. They show significant negative effects on rates from the availability of five channels and also of more than six channels. Because the coefficient on the "five channels" variable is "not significantly different" from the coefficient on the "greater than six channels variable," they argue that the maximum effect is reached at five signals. However, unlike the NTIA Staff Report, Dertouzos and Wildman did not report on the separate effects of greater numbers of channels (i.e., 7, 8, 9, 10, or more). Therefore, their conclusion that the maximum effect is reached at five signals may not be correct.

26. In order to conclude that availability of five signals is sufficient to provide effective competition to cable, Dertouzos and Wildman use a study by Jaffe and Kanter, which is not in the record.[24] That study

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24 See Dertouzous-Wildman Study, pp. 24-26.

purports to show that, in the 100 largest broadcast markets, the deregulation of the cable television industry by the Cable Act of 1984 did not lead to an increase in cable system selling prices. Jaffe and Kanter conclude from this that "intermedia competition appears to be effective in the largest markets." This study has been criticized on methodological grounds by MacAvoy.[25] However, aside from any such criticisms, its results do not support the inference that Dertouzos and Wildman try to make from them. Dertouzos and Wildman note that most of the top 100 markets have five or more broadcast signals, while most of the others have four or fewer. Since the markets in which system prices have allegedly not risen since deregulation have not five, but five or more signals in general, the Jaffe-Kanter results do not support the conclusion that five signals is the critical number needed to provide effective competition to cable.

27. The Ducey and McLean Study contains regression equations relating the change in basic rates between 1986 and 1988 (apparently in percentage terms) to the number of off-the-air signals available in the cable service area in 1988. No statistically significant relationship is found. However, the authors do not explain why a relationship between changes in rates and broadcast signal availability should be expected. To rationalize such a relationship requires assumptions regarding the extent to which regulation constrained 1986 rates and would also require information on which systems in the sample were regulated and which were unregulated in 1986. The more clear-cut and obvious relationship, and the one successfully identified in the other regression studies, is between rate levels and signal availability.

28. In addition to the unsatisfactory specification of the dependent variable, the equations estimated also suffer from omission of independent variables other than signal availability. Among the other relevant factors that should have been controlled for are the regulatory status of the cable systems in the sample in 1986 and variations across systems in the number of channels offered on the basic tier. The other studies either used the per channel price as the dependent variable or included number of channels on basic as an independent variable. In each case, the results were statistically significant.

29. Finally, the equations were estimated only in linear form. The other studies employed a log linear functional form. If Ducey and McLean had tested alternative functional forms, their results might have been different. In view of the weaknesses in their analysis, and the significant relationship between basic cable rates and signal availability in the other

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25 MacAvoy Reply Statement, pp. 24-30.

studies, there is no reason to weaken the conclusion that broadcast signal availability does, in fact, constrain basic rates.

30. The MacAvoy Reply Statement includes an equation explaining market value per subscriber for a sample of recently-sold cable systems by various factors including the availability of broadcast signals.[26] He finds that broadcast signal availability has a statistically significant negative effect on market value per subscriber, but the magnitude is small.[27]

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26 MacAvoy Reply Statement, pp. 31-36.

27 MacAvoy combines his regression results with information on replacement costs for cable systems and goes through an exercise purporting to show that roughly 60 broadcast signals would be needed to bring the market value per subscriber down to a level that would yield a q ratio of one. Because this figure is far outside the signal availability range in his sample, and because of the factors discussed above concerning measurement problems in calculating q ratios, we view the 60 signal finding sceptically.

APPENDIX F

TABLES FROM FCC-GAO SURVEY

The following tables present data from the FCC-GAO survey regarding the changes in rates for cable services over the last five years. In general, the cable systems included in the survey were randomly selected as part of a nationwide sample of cable systems.[1] The sample of systems receiving survey questionnaires represents approximately 22 percent of all cable systems in the United States, but accounts for about 62 percent of subscribers. Of the 1,971 surveys sent to cable systems, 1,530 were returned, for a response rate of 77.6 percent. FCC and GAO staff reviewed all for completeness. Where information was incomplete, the staff tried to obtain usable information by contacting respondents directly. Not all the historical data requested was easily obtained from respondents, due to staff turnovers, changes in system ownership and records not readily accessible. Some systems were too new to have certain data elements requested on the survey. Except in those instances when current rate schedules were provided with the returned survey (as requested), time constraints prevented us from verifying the accuracy of data. We have therefore been constrained to rely on survey participants for the accuracy of the data provided. Thus, the data tabulated below generally reflect the information exactly as submitted by the participating cable systems. Where applicable, the number of respondents for each category is indicated and the accompanying data are presented on a per system basis unless otherwise specified.[2]

The FCC-GAO data represent information from an unbiased stratified sample of cable systems. A substantial response rate of almost 78 percent indicates that we have captured a representative cross-section of the cable industry.[3] In general, we have obtained a reasonable depiction of the changes

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1 For more information about how the sample was designed, see the "Explanation of Differences Between Data Presented in the FCC and GAO Reports" at the end of the numbered tables in this Appendix.

2 The General Accounting Office, Telecommunications: Follow-up Survey of Cable Television Rates and Services, Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives (June 13, 1990) ("GAO Report"), published results of the same survey but generally on a per subscriber basis. Our results and those of GAO are generally consistent; differences in results are generally attributable to differences in the way we aggregated and analyzed the data.

3 It should be noted that without cost data, this survey alone cannot be used to make a determination regarding market power.

that have occurred with respect to cable rates and services. In addition to overall figures, the tables herein provide results for certain subsets of the sample. Estimates or differences based upon a particularly small number of cases in a category as compared to the total universe for that category may not be statistically significant and, therefore, must be viewed with caution. As the following analysis reflects, however, it is clear that the actual dollar figure for basic rates has increased significantly since deregulation, but that the per channel cost of services to subscribers on the basic rate tiers has increased to a lesser extent.

Tables 1A and 1B

Table 1A presents the average rate, the annual percent change in the average rate, the average number of channels and cost per channel to the subscriber for the entire sample of systems for each of the three tiers of basic service for which information was requested. Table 1B presents the same data for the most "popular" tier of basic service. We account for the differences between entries for basic service rates, average number of channels and average cost per channel to the subscriber appearing in Tables 1A and 1B and the corresponding GAO figures in a discussion following Table 12 in this Appendix.

TABLE 1A

(for entire sample)

TIER I - Basic Service Rates, Average Number of Channels and Cost/Channel

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average* No. of Channels	Average Cost Per Channel
12/31/84	1091	$ 1.50 -	$28.00	$ 9.09	-	16	$0.57
12/31/85	1147	$ 1.00 -	$28.00	$ 9.56	5.1	17	$0.56
11/30/86	1251	$ .99 -	$29.25	$10.23	7.0	18	$0.57
12/31/87	1330	$ .99 -	$31.00	$11.82	15.5	21	$0.56
12/31/88	1415	$ .99 -	$31.00	$12.83	8.5	22	$0.58
12/31/89	1500	$ 1.00 -	$30.00	$13.93	8.6	23	$0.61

* Not all of the respondents who submitted rate data also submitted channel counts; therefore, the average number of channels per system was calculated from the number of respondents who submitted a channel count - a number slightly different than the number of responses indicated in the table.

TIER II - Basic Service Rates, Average Number of Channels and Cost/Channel

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average* No. of Channels	Average Cost Per Channel
12/31/84	398	$ 2.05 -	$32.95	$12.46	-	23	$0.54
12/31/85	444	$ 2.05 -	$32.95	$13.11	5.2	23	$0.57
11/30/86	463	$ 2.05 -	$35.95	$13.54	3.3	24	$0.56
12/31/87	367	$ 1.00 -	$35.95	$14.58	7.7	26	$0.56
12/31/88	346	$ 1.00 -	$38.90	$15.37	5.4	28	$0.55
12/31/89	353	$ 1.00 -	$38.90	$16.34	6.3	30	$0.54

TIER III - Basic Service Rates, Average Number of Channels and Cost/Channel

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average* No. of Channels	Average Cost Per Channel
12/31/84	46	$ 6.95 -	$31.50	$12.60	-	37	$0.34
12/31/85	53	$ 6.95 -	$31.50	$13.66	8.4	35	$0.39
11/30/86	63	$ 7.95 -	$31.50	$14.27	4.5	36	$0.40
12/31/87	47	$ 7.25 -	$31.50	$15.76	10.4	33	$0.48
12/31/88	56	$10.81 -	$31.50	$17.49	11.0	33	$0.53
12/31/89	61	$13.90 -	$31.50	$18.20	4.1	33	$0.55

TABLE 1B

(for entire sample)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	884	$ 2.00 -	$28.00	$ 9.67	-	18	$0.54
12/31/85	953	$ 1.00 -	$28.00	$10.33	6.8	20	$0.52
11/30/86	1096	$ 4.00 -	$29.25	$11.28	9.2	21	$0.54
12/31/87	1214	$ 4.00 -	$31.00	$12.92	14.5	24	$0.54
12/31/88	1316	$ 4.00 -	$31.00	$14.27	10.4	25	$0.57
12/31/89	1465	$ 4.00 -	$30.00	$15.55	9.0	27	$0.58

* The most popular tier (the tier with the most subscribers) is either tier I, II or III depending on the system; therefore, the figures in this table represent a mixture of data from tiers I, II and III.

** Not all of the respondents who submitted rate data also submitted channel counts; therefore, the average number of channels per system was calculated for the number of respondents who submitted a channel count - a number slightly different than the number of responses indicated in the table.

Tables 2A, 2B, 2C, 2D and 2E

Tables 2A through 2E presents the same data as Table 1B (the most "popular" tier) but stratified by the following subscriber counts: 1-1,000 (Table 2A); 1,001-3,500 (Table 2B); 3,501-10,000 (Table 2C); 10,001-50,000 (Table 2D); and, 50,000+ (Table 2E). We account for the differences between the entries for basic service rates, average number of channels and average cost per channel to the subscriber appearing in these tables and the corresponding GAO figures in a discussion following Table 12 in this Appendix.

TABLE 2A
(for those systems with 1-1000 subscribers)
Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	114	$ 2.00 -	$19.90	$10.04	-	11	$0.91
12/31/85	137	$ 2.00 -	$19.90	$10.33	2.9	12	$0.86
11/30/86	169	$ 4.00 -	$19.90	$11.09	7.4	12	$0.92
12/31/87	219	$ 4.00 -	$19.90	$12.09	9.0	14	$0.86
12/31/88	273	$ 4.00 -	$19.90	$13.29	9.9	15	$0.89
12/31/89	345	$ 4.00 -	$30.00	$14.46	8.8	16	$0.90

TABLE 2B
(for those systems with 1,001-3,500 subscribers)
Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	166	$ 4.00 -	$17.31	$ 9.49	-	14	$0.68
12/31/85	176	$ 4.00 -	$17.31	$10.08	6.2	15	$0.67
11/30/86	201	$ 4.00 -	$17.31	$10.85	7.6	17	$0.64
12/31/87	232	$ 4.00 -	$22.95	$12.50	15.2	19	$0.66
12/31/88	259	$ 4.00 -	$24.95	$13.88	11.0	21	$0.66
12/31/89	301	$ 6.00 -	$28.95	$15.33	10.4	24	$0.64

TABLE 2C
(for those systems with 3,501-10,000 subscribers)
Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	236	$ 3.90 -	$14.00	$ 9.28	-	18	$0.52
12/31/85	249	$ 3.71 -	$16.50	$10.09	8.7	19	$0.53
11/30/86	283	$ 4.00 -	$16.95	$10.98	8.8	21	$0.52
12/31/87	305	$ 4.14 -	$19.52	$12.85	17.0	24	$0.54
12/31/88	316	$ 4.14 -	$21.58	$14.33	11.5	27	$0.53
12/31/89	332	$ 4.43 -	$21.58	$15.70	9.6	28	$0.56

TABLE 2D

(for those systems with 10,001-50,000 subscribers)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	253	$ 5.50 -	$15.95	$ 9.67	-	22	$0.44
12/31/85	269	$ 1.00 -	$18.95	$10.39	7.4	23	$0.45
11/30/86	304	$ 6.00 -	$19.95	$11.43	10.0	25	$0.46
12/31/87	314	$ 5.00 -	$17.95	$13.30	16.4	28	$0.48
12/31/88	323	$ 5.00 -	$18.65	$14.81	11.4	31	$0.48
12/31/89	340	$ 5.00 -	$20.54	$16.22	9.5	33	$0.49

TABLE 2E

(for those systems with 50,000+ subscribers)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	113	$ 2.00 -	$16.95	$10.19	-	26	$0.39
12/31/85	120	$ 1.95 -	$17.75	$10.97	7.7	28	$0.39
11/30/86	137	$ 7.70 -	$19.95	$12.35	12.6	31	$0.40
12/31/87	142	$ 9.85 -	$20.95	$14.08	14.0	34	$0.41
12/31/88	142	$ 7.30 -	$22.00	$15.37	9.2	36	$0.43
12/31/89	146	$ 4.95 -	$22.00	$16.75	9.0	37	$0.45

Table 2F

Average rates by system subscriber count - composite of Tables 2A through 2E

Date	1-1,000	1,001-3,500	3,501-10,000	10,001-50,000	50,000+
12/31/84	$10.04	$ 9.49	$ 9.28	$ 9.67	$10.19
12/31/85	$10.33	$10.08	$10.09	$10.39	$10.97
11/30/86	$11.09	$10.85	$10.98	$11.43	$12.35
12/31/87	$12.09	$12.50	$12.85	$13.30	$14.08
12/31/88	$13.29	$13.88	$14.33	$14.81	$15.37
12/31/89	$14.46	$15.33	$15.70	$16.22	$16.75

Table 2G

Average number of channels offered by system subscriber count - composite of Tables 2A through 2E

Date	1-1,000	1,001-3,500	3,501-10,000	10,001-50,000	50,000+
12/31/84	11	14	18	22	26
12/31/85	12	15	19	23	28
11/30/86	12	17	21	25	31
12/31/87	14	19	24	28	34
12/31/88	15	21	27	31	36
12/31/89	16	24	28	33	37

Table 2H

Average cost per channel to the subscriber by system subscriber count - composite of Tables 2A through 2E

Date	1-1,000	1,001-3,500	3,501-10,000	10,001-50,000	50,000+
12/31/84	$0.91	$0.68	$0.52	$0.44	$0.39
12/31/85	$0.86	$0.67	$0.53	$0.45	$0.39
11/30/86	$0.92	$0.64	$0.52	$0.46	$0.40
12/31/87	$0.86	$0.66	$0.54	$0.48	$0.41
12/31/88	$0.89	$0.66	$0.53	$0.48	$0.43
12/31/89	$0.90	$0.64	$0.56	$0.49	$0.45

Tables 3A and 3B

Tables 3A and 3B present the same data as Table 1B (the most "popular" tier) but for systems with a current multiple system owner (MSO) interest of at least 10% (Table 3A) and systems with no (or less than 10%) MSO interest (Table 3B). We account for differences between the entries appearing in these tables and corresponding GAO figures in a discussion following Table 12 in this Appendix.

TABLE 3A

(for those systems with an MSO interest of >10%)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	570	$ 2.00 -	$16.95	$ 9.65	-	20	$0.48
12/31/85	608	$ 1.00 -	$18.95	$10.41	7.9	21	$0.50
11/30/86	684	$ 4.00 -	$19.95	$11.44	9.9	23	$0.50
12/31/87	731	$ 4.14 -	$19.95	$13.29	16.2	26	$0.51
12/31/88	774	$ 4.14 -	$22.00	$14.71	10.7	28	$0.53
12/31/89	816	$ 4.43 -	$22.00	$16.06	9.2	30	$0.54

TABLE 3B

(systems with no (or <10%) MSO interest)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	303	$ 2.00 -	$28.00	$ 9.72	-	16	$0.61
12/31/85	334	$ 2.00 -	$28.00	$10.22	5.1	17	$0.60
11/30/86	400	$ 4.00 -	$29.25	$11.05	8.1	18	$0.61
12/31/87	466	$ 4.00 -	$31.00	$12.37	11.9	20	$0.62
12/31/88	516	$ 4.00 -	$31.00	$13.63	10.1	21	$0.65
12/31/89	614	$ 4.00 -	$30.00	$14.87	9.1	23	$0.65

Tables 4A and 4B

Tables 4A and 4B presents the same data as Table 1B (the most "popular" tier) but for systems with a change in ownership since December 31, 1984, (Table 4A) and systems with no change (Table 4B). Systems that indicated a change in ownership in each year since 1984 have their five year historical data displayed in **Tables 4C** through **4G**. Table 4C presents the most popular tier data for those systems that changed ownership in 1985. Similarly, tables 4D, 4E, 4F, and 4G presents the most popular tier data for those systems that experienced an ownership change in 1986, 1987, 1988, and 1989, respectively. **Table 4H** presents the most popular tier data for those systems that experienced more than one ownership change over the five year period, while **Table 4I** presents similar data for those systems experiencing an ownership change only once during this period. We account for differences between entries appearing in these tables and corresponding GAO figures in the discussion following Table 12 in this Appendix.

TABLE 4A
(systems that changed ownership since 12/31/84)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	287	$ 2.05 -	$19.45	$ 9.90	-	19	$0.52
12/31/85	321	$ 1.95 -	$17.31	$10.60	7.0	20	$0.53
11/30/86	417	$ 4.00 -	$19.95	$11.56	9.1	21	$0.55
12/31/87	518	$ 4.14 -	$22.95	$13.28	14.9	23	$0.58
12/31/88	603	$ 4.14 -	$24.95	$14.67	10.5	24	$0.61
12/31/89	704	$ 4.43 -	$28.95	$15.95	8.7	25	$0.64

TABLE 4B
(systems with no ownership change)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	587	$ 2.00 -	$28.00	$ 9.57	-	18	$0.53
12/31/85	623	$ 1.00 -	$28.00	$10.21	6.7	20	$0.51
11/30/86	666	$ 4.00 -	$29.25	$11.11	8.8	22	$0.51
12/31/87	680	$ 4.00 -	$31.00	$12.66	14.0	24	$0.53
12/31/88	697	$ 4.00 -	$31.00	$13.92	10.0	26	$0.54
12/31/89	739	$ 4.00 -	$30.00	$15.17	9.0	28	$0.54

TABLE 4C

(for those systems that changed ownership in 1985)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	58	$ 5.00 -	$19.45	$ 9.55	-	17	$0.56
12/31/85	76	$ 5.50 -	$16.80	$10.58	10.8	20	$0.53
11/30/86	91	$ 4.00 -	$19.95	$11.58	9.5	21	$0.55
12/31/87	99	$ 5.50 -	$22.95	$13.69	18.2	24	$0.57
12/31/88	111	$ 7.50 -	$24.95	$14.89	8.8	25	$0.60
12/31/89	121	$11.20 -	$28.95	$16.30	9.5	27	$0.60

TABLE 4D

(for those systems that changed ownership in 1986)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	118	$ 4.00 -	$17.31	$10.08	-	19	$0.53
12/31/85	126	$ 4.00 -	$17.31	$10.73	6.4	20	$0.54
11/30/86	184	$ 4.00 -	$17.85	$11.52	7.4	21	$0.55
12/31/87	216	$ 5.00 -	$18.95	$13.24	14.9	23	$0.58
12/31/88	225	$ 5.00 -	$20.00	$14.77	11.6	25	$0.59
12/31/89	242	$ 5.00 -	$21.15	$16.11	11.3	26	$0.62

TABLE 4E

(for those systems that changed ownership in 1987)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	80	$ 5.50 -	$14.00	$ 9.89	-	17	$0.58
12/31/85	86	$ 1.95 -	$15.40	$10.47	5.9	18	$0.58
11/30/86	103	$ 5.50 -	$18.90	$11.57	10.5	21	$0.55
12/31/87	158	$ 5.50 -	$18.95	$13.16	13.7	22	$0.60
12/31/88	177	$ 6.50 -	$19.95	$14.95	13.6	24	$0.62
12/31/89	197	$ 6.50 -	$20.95	$16.18	8.2	26	$0.62

TABLE 4F

(for those systems that changed ownership in 1988)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	76	$ 5.00 -	$15.95	$ 9.58	-	20	$0.48
12/31/85	80	$ 5.00 -	$16.95	$10.75	12.2	22	$0.49
11/30/86	96	$ 5.00 -	$19.95	$11.83	10.0	23	$0.51
12/31/87	115	$ 5.00 -	$18.95	$13.46	13.8	25	$0.54
12/31/88	179	$ 5.00 -	$19.98	$14.64	8.8	23	$0.64
12/31/89	210	$ 5.00 -	$20.95	$15.95	8.9	24	$0.66

TABLE 4G

(for those systems that changed ownership in 1989)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	49	$ 2.05 -	$15.75	$ 9.88	-	20	$0.49
12/31/85	54	$ 3.71 -	$15.75	$10.67	8.0	20	$0.53
11/30/86	69	$ 4.05 -	$15.90	$11.67	9.3	21	$0.56
12/31/87	86	$ 4.14 -	$16.95	$13.13	12.5	23	$0.57
12/31/88	94	$ 4.14 -	$18.95	$14.37	9.4	24	$0.60
12/31/89	153	$ 4.43 -	$19.45	$15.26	6.2	25	$0.61

TABLE 4H

(for those systems that changed hands more than once between 12/84 and 12/89)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	85	$ 5.00 -	$16.80	$ 9.63	-	19	$0.51
12/31/85	92	$ 5.00 -	$16.80	$10.81	12.3	20	$0.54
11/30/86	114	$ 5.00 -	$19.95	$11.90	10.1	22	$0.54
12/31/87	143	$ 5.00 -	$17.95	$13.42	12.8	24	$0.56
12/31/88	163	$ 5.00 -	$18.95	$15.04	12.1	25	$0.60
12/31/89	192	$ 5.00 -	$19.95	$16.06	6.8	26	$0.62

TABLE 4I

(for those systems that changed hands only once between 12/84 and 12/89)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	203	$ 2.05 -	$19.45	$10.02	-	19	$0.53
12/31/85	230	$ 1.95 -	$17.31	$10.52	5.0	20	$0.53
11/30/86	304	$ 4.00 -	$18.90	$11.44	8.7	21	$0.54
12/31/87	376	$ 4.14 -	$22.95	$13.23	15.6	22	$0.60
12/31/88	441	$ 4.14 -	$24.95	$14.54	9.9	23	$0.63
12/31/89	514	$ 4.43 -	$28.95	$15.92	9.5	25	$0.64

Tables 5A and 5B

Tables 5A and 5B present the same data as Tables 1B (the most "popular" tier) for systems that were regulated (Table 5A) and for those not regulated (Table 5B) but only for three specific points in time. We account for any differences between the entries appearing in these tables and corresponding GAO figures in the discussion that follows Table 12 of this Appendix.

TABLE 5A

(systems that were regulated)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	687	$ 2.00 -	$28.00	$ 9.50	-	19	$0.50
11/30/86	823	$ 4.00 -	$19.95	$11.14	17.3	22	$0.51
12/31/89	41	$ 5.00 -	$25.00	$13.56	21.7	20	$0.68

TABLE 5B

(systems that were not regulated)

Most Popular Tier* - Basic Service Rates, Average No. of Channels and Cost/Ch.

Date	Number of Responses	<----Range----> Low	High	Average Rate	% Change From Previous Date	Average** No. of Channels	Average Cost Per Channel
12/31/84	180	$ 2.00 -	$17.31	$10.35	-	18	$0.57
11/30/86	251	$ 4.00 -	$29.25	$11.76	13.6	22	$0.53
12/31/89	1419	$ 4.00 -	$30.00	$15.61	32.7	27	$0.58

Tables 6 - 12

Tables 6 through 12 highlight selected information from the survey for three specific points in time (December 31, 1984; November 30, 1986; December 31, 1989). These data are for the entire sample of cable systems and are delineated by the following:

Table 6 - Average channel capacity and active channels per system.

Table 7 - Average number of basic, premium, and pay-per-view channels per system.

Table 8 - Type and average number of program services carried on tiers I and II.

Table 9 - Rates for premium channels HBO, Showtime and Cinemax.

Table 10 - Average number of network affiliates, other commercial and non-commercial stations available over-the-air in the cable system's franchise area.

Table 11 - Number and percent of cable systems that changed ownership since December 31, 1984.

Table 12 - Number and percent of regulated/unregulated cable systems.

We account for any differences between entries appearing in these tables and corresponding GAO figures in the discussion that follows Table 12.

TABLE 6

Average Channel Capacity and Active Channels

Date	<--Channel Capacity--> Number of Responses	Average No. of Ch.	<--Active Channels---> Number of Responses	Average No. of Ch.
12/31/84	1112	32	1105	23
11/30/86	1265	35	1272	27
12/31/89	1485	39	1499	32

TABLE 7

Average Number of Basic, Premium, and Pay-Per-View Channels Per System

Date	<--Basic Channels---> Number of Responses	Average No. of Ch.	<--Premium Channels-> Number of Responses	Average No. of Ch.	<---PPV Channels---> Number of Responses	Average No. of Ch.
12/31/84	1104	20	1089	3	35	2
11/30/86	1274	22	1256	4	99	1
12/31/89	1507	27	1494	4	419	2

TABLE 8

Type and Average Number of Program Services Carried on Tier I
(of those systems in the entire sample that reported carrying at least one station in each category of program service - all averages rounded up to nearest unit)

Type of Program Service	<-----12/31/84------> Number of Responses	Average No. of Ch.	<-----11/30/86------> Number of Responses	Average No. of Ch.	<-----12/31/89------> Number of Responses	Average No. of Ch.
Local:						
Net. Affil.	1003	4	1164	4	1406	4
Commercial	622	3	823	3	1094	3
Non-Comm'l	892	1	1050	1	1281	1
Distant:						
Net. Affil.	419	3	437	3	518	3
Commercial	879	2	1033	2	1271	2
Non-Comm'l	238	1	250	1	285	1
Cable Net.	929	7	1100	9	1327	14
Leased Acc.	145	1	181	1	216	1
Other	565	2	661	2	796	2

Type and Average Number of Program Services Carried on Tier II
(of those systems in the entire sample that reported carrying at least one station in each category of program service - all averages rounded up to nearest unit)

Type of Program Service	<-----12/31/84------> Number of Responses	Average No. of Ch.	<-----11/30/86------> Number of Responses	Average No. of Ch.	<-----12/31/89------> Number of Responses	Average No. of Ch.
Local:						
Net. Affil.	328	4	393	4	336	4
Commercial	225	3	296	3	284	3
Non-Comm'l	295	2	359	2	321	2
Distant:						
Net. Affil.	147	3	164	3	114	2
Commercial	318	2	376	2	307	3
Non-Comm'l	88	1	97	1	69	1
Cable Net.	355	11	414	12	337	17
Leased Acc.	72	2	93	1	96	1
Other	223	3	266	3	254	3

TABLE 9

Rates For Premium Channels HBO, Showtime and Cinemax

Date	HBO Number of Responses	HBO Average Rate	Showtime Number of Responses	Showtime Average Rate	Cinemax Number of Responses	Cinemax Average Rate
12/31/84	964	$10.39	594	$10.30	559	$ 9.88
11/30/86	1159	$10.59	794	$10.41	774	$10.09
12/31/89	1402	$10.39	1057	$10.14	1060	$ 9.91

TABLE 10

Average Number of Network Affiliates, Other Commercial and Non-Commercial Stations Available Over-the-Air in the Cable System's Franchise Area

Type of Station	12/31/84 Number of Responses	12/31/84 Avg. No. of Sta.	11/30/86 Number of Responses	11/30/86 Avg. No. of Sta.	12/31/89 Number of Responses	12/31/89 Avg. No. of Sta.
Net. Affil.	1063	4	1192	4	1432	4
Commercial	702	3	900	3	1158	3
Non-Comm'l	900	2	1031	2	1231	2

TABLE 11

Number and Percent of Cable Systems That Changed Ownership Since 12/31/84

	Number of Responses	%
Changed	728	48.5
No Change	763	50.9
Unsure	9	0.6
Total	1500	100.0

TABLE 12

Number and Percent of Regulated/Unregulated Cable Systems

Date	Regulated Number of Responses	Regulated %	Unregulated Number of Responses	Unregulated %	Unsure Number of Responses	Unsure %	Total
12/31/84	1006	76.4	237	18.0	73	5.5	1316
11/30/86	1023	73.3	303	21.7	69	4.9	1395
12/31/89	43	2.8	1463	96.9	4	0.3	1510

Explanation of Differences Between Data Presented in the FCC and GAO Reports

The data presented in the FCC Report and the GAO Report differ in a number of instances although both reports used the same source of information -- the returned surveys. The first, and major, difference (which accounts for almost all of the discrepancies) is the fact that GAO presented its data on a per subscriber basis whereas all FCC data are presented on a per system basis. Second, all GAO data are projected to the universe of cable subscribers while FCC data are straight compilations and summations of the survey responses with no manipulation of the data. By using GAO's methodology, all data attributed to large systems (those with the most subscribers) carry more weight in its overall calculations. Our calculations count each observation (system) as equal. Since large systems tend to have higher rates and offer more channels (at a lower per channel to the subscriber) than smaller systems, GAO's data will generally reveal a higher cable rate but with more channels offered at a lower cost per channel than our data. For example, the average monthly charge for basic cable service on the lowest-priced tier followed by the percent increase from the previous date is:

	GAO per sub	% Change From Previous Date	FCC per system	% Change From Previous Date
12/31/84	$ 9.50	-	$ 9.09	-
12/31/85	$10.19	7.2	$ 9.56	5.1
11/30/86	$11.14	9.3	$10.23	7.0
12/31/87	$13.01	16.8	$11.82	15.5
12/31/88	$14.50	11.4	$12.83	8.5
12/31/89	$15.95	10.0	$13.93	8.6

For the most popular tier:

	GAO per sub	% Change From Previous Date	FCC per system	% Change From Previous Date
12/31/84	$ 9.84	-	$ 9.67	-
12/31/85	$10.60	7.7	$10.33	6.8
11/30/86	$11.71	10.5	$11.28	9.2
12/31/87	$13.47	15.0	$12.92	14.5
12/31/88	$14.91	10.7	$14.27	10.4
12/31/89	$16.33	9.5	$15.55	9.0

The average number of channels and cost per channel on the lowest-priced tier:

	GAO per sub		FCC per system	
12/31/84	20.5	$0.46	16	$0.57
12/31/85	21.8	$0.47	17	$0.56
11/30/86	24.2	$0.47	18	$0.57
12/31/87	27.7	$0.48	21	$0.56
12/31/88	30.2	$0.49	22	$0.58
12/31/89	31.2	$0.51	23	$0.61

The average number of channels and cost per channel on the most popular tier:

	GAO per sub		FCC per system	
12/31/84	22.8	$0.43	18	$0.54
12/31/85	24.6	$0.43	20	$0.52
11/30/86	27.1	$0.44	21	$0.54
12/31/87	30.0	$0.45	24	$0.54
12/31/88	32.2	$0.47	25	$0.57
12/31/89	33.6	$0.49	27	$0.58

Number of Systems by Strata

The cable systems were generally randomly selected as a part of a nation-wide sample of cable systems. The sample was designed using five size groupings (or strata) of systems based on subscriber count: 1-1,000; 1,001-3,500; 3,501-10,000; 10,001-50,000; 50,000+. (Subscriber counts were from a recent Television & Cable Factbook). Systems were randomly chosen within each stratum except for the stratum containing systems with greater than 50,000 subscribers. Since less than 2 percent of almost 9,000 total systems have more than 50,000 subscribers, all systems within that stratum were sent surveys. GAO assigned a value to each system that was sent a survey corresponding to the stratum from which it was chosen. GAO then sorted returned surveys on this value and made the appropriate projections for its tables. Several of our tables used subscriber count information from Question 1 of the survey which asked how many subscribers the cable system served on December 31, 1989. Since this count is more recent and, therefore, different than that appearing in the Factbook, the actual count of systems within each strata returning a survey differs as follows:

Subs	GAO Count	FCC Count
1-1,000	353	362
1,001-3,500	318	308
3,501-10,000	357	344
10,001-50,000	351	347
50,000+	151	148
Total Surveys Returned	1530	1509 (that answered q.1)

Systems Sold

Similarly, GAO states that the percentage of cable systems that were sold between 1985 and 1989 is 53% with 13% having changed owners more than once (a sort on Question 19 of the survey, which asked how many times in each year the system sold). Our figure (48.5%) of cable systems changing hands at least once is a direct sort on Question 18, which asked whether or not the system changed ownership between 1985 and 1989.

Premium Channel Rates

GAO presented premium channel rates for HBO, Showtime and Cinemax on a per system basis but projected to the universe of systems. Our data are, again, straight compilations and averages of the responses. Both sets of figures depict the same pattern of change in the rates for premium channels. Rates for all three premium channels increased from 12/31/84 to 11/30/86; but, by 12/31/89 the rates generally returned to 1984 dollar levels.

	<-------HBO------->		<----Showtime----->		<-----Cinemax----->	
Date	GAO Rate	FCC Rate	GAO Rate	FCC Rate	GAO Rate	FCC Rate
12/31/84	$10.19	$10.39	$10.14	$10.30	$ 9.75	$ 9.88
11/30/86	$10.37	$10.59	$10.23	$10.41	$ 9.93	$10.09
12/31/89	$10.24	$10.39	$10.02	$10.14	$ 9.80	$ 9.91

Programming Offerings

GAO has a table (I.9) (1990 Report at p. 53) depicting the number of different types of programming available to the average subscriber on the lowest-priced tier. In generating this table, GAO summed the number of different types of programming listed in question 15. If the total was less than or five more than the count of channels offered in question 5, GAO deemed the information in question 15 as inaccurate and deleted the record for this table only. There were over 150 such records. Coupling this with the previously stated differences in methodology leads to the following differences between FCC and GAO figures:

	12/31/84		11/30/86		12/31/89	
Prog. Type	GAO	FCC	GAO	FCC	GAO	FCC
Local TV	7.2	8	7.7	8	7.9	8
Distant TV	3.3	6	3.1	6	3.1	6
Cable Nets	7.8	7	11.1	9	17.3	14
L.Acc/Other	2.3	3	2.3	3	2.5	3

Differences in the absolute numbers aside, the numbers in this table make the same point: that is, all of the growth in programming services occurred in basic cable networks.

Other Differences

Number of Over-the-Air Signals available in the cable community:

Date	(GAO) Available to Average Sub.	(FCC) Available to Average Sys.
12/31/84	7.9	9
11/30/86	8.4	9
12/31/89	8.9	9

Number of Active Channels Carried by System:

Date	(GAO) Available to Average Sub.	(FCC) Available to Average Sys.
12/31/84	29.0	23
11/30/86	33.7	27
12/31/89	39.8	32

APPENDIX G

HORIZONTAL CONCENTRATION, VERTICAL INTEGRATION AND PROGRAM ACCESS

TABLE I

CURRENT CONCENTRATION OF CONTROL OF THE CABLE TELEVISION INDUSTRY 1/

Rank	Company	Share of Top 50 2/	Share of Total Industry 3/
1	TCI	24.73%	22.16%
2	Time Warner	12.92	11.58
3	Comcast Cable	9.25	8.29
4	Continental Cablevision	5.39	4.83
Top 4		52.29	46.86
5	Cox Cable	3.38	3.03
6	Cablevision Systems	3.17	2.84
7	Jones Intercable*	3.06	2.74
8	NewChannels	2.53	2.27
Top 8		64.43	57.74
9	Times Mirror*	2.35%	2.10%
10	Cablevision Industries*	2.17	1.95
Top 10*		68.95	61.79
Top 25*		88.80	79.58
Top 50*		100.00	89.60

HHI assuming the top 50 companies represent the whole industry = 975**

Gini Index for top 50 companies = 0.64**

1/ As part of this Inquiry, the Commission requested certain updated information, including subscriber counts, from the top nine MSO's. This table was generated using that information, other comments filed in the Inquiry, and the top 50 MSO list from Broadcasting, December 11, 1989, page 42. The analysis has been adjusted to reflect the ATC/Time Warner merger.

2/ Total number of subscribers for the top 50 MSOs is 47,705,561. Information on the top 50 MSOs is used to determine the HHI.

3/ According to Broadcasting, March 26, 1990, at 16, the total number of cable subscribers is 53,238,000. Data prepared by Broadcasting and industry sources.

* Updated subscriber counts for these MSOs were unavailable and therefore estimated. To obtain the 1990 subscriber counts, the 1989 subscriber counts for these MSOs were adjusted upward by a factor of 1.046, which represented the overall growth factor in cable subscribership (53,238,000 divided by 50,897,080 = 1.046). The 1989 subscriber count was obtained from Broadcasting, December 11, 1989, at 42. This adjustment compensates for the continuing growth of the cable industry as a whole and prevents us from overrepresenting the top MSOs' share of the industry.

** If data were available for the entire industry, the indices would be lower. A lower value indicates less concentration. Therefore, the analysis based on only 50 companies maximizes the estimate of industry concentration.

TABLE II

CHANGES IN CONCENTRATION OF CONTROL OF THE CABLE INDUSTRY WITHIN THE TOP 50 COMPANIES 1/

	1972	1975	1979	1982	1984	1985	1988	1989	1990
Top Co. Share	15.0	15.3	11.6	11.1	10.7	12.4	24.8	25.8	24.7
Top 4 Share	35.9	37.3	34.3	37.3	33.6	34.3	45.5	50.4	52.3
Top 8 Share	53.4	54.0	52.1	54.6	51.8	50.6	58.4	63.0	64.4
Top 10 Share	59.6	59.3	58.0	60.3	58.0	56.8	63.7	67.7	69.0
Top 25 Share	83.2	82.7	83.0	83.8	82.4	82.9	85.5	88.4	88.8
HHI	524	533	468	507	457	464	868	1000	975
Gini Index	.52	.52	.49	.53	.50	.51	.59	.63	.64

TABLE III

CHANGES IN CONCENTRATION OF CONTROL OF THE CABLE INDUSTRY BASED ON TOTAL SUBSCRIBERS 1/

	1972	1975	1979	1982	1984	1985	1988	1989	1990
Top Co. Share	9.9	10.4	8.4	8.7	9.2	9.0	20.9	22.2	22.2
Top 4 Share	23.9	25.2	24.9	29.3	28.7	24.9	38.4	43.4	46.9
Top 8 Share	35.4	36.5	37.8	42.8	44.2	36.8	49.3	54.2	57.7
Top 10 Share	39.6	40.1	42.1	47.4	49.5	41.3	53.8	58.3	61.8
Top 25 Share	55.2	56.0	60.3	65.8	70.2	60.7	73.1	76.1	79.6
Top 50 Share	66.4	67.8	72.7	78.5	85.2	72.3	84.5	86.2	89.6

1/ Data for 1990 from Table I above. Data for 1989 calculated from information appearing in Broadcasting, December 11, 1989, at 42. Data for 1988 and 1985 calculated from information appearing in Broadcasting, May 2, 1988, at 36, and December 2, 1985, at 37, respectively. Data for 1984 calculated from information in Television & Cable Factbook Volume 52 at 1726 and Volume 53 at 1385 and Television Digest 1985, Cable and Station Coverage Atlas, at 4. Other data taken from 1982 Report and Order in Docket No. 18891, 91 FCC 2d 46 (1982), Appendix A.

Table IV

NATIONAL CABLE PROGRAMMING NETWORKS WITH CABLE OPERATOR OWNERSHIP/EQUITY 1/

Service	Began
AMC (American Movie Classics)	10/84
BET (Black Entertainment Television)	1/80
Bravo	2/80
CBN Family Channel	5/77
CNBC (Consumer News and Business Channel)	4/89
CNN (Cable News Network)	6/80
C-SPAN I	3/79
C-SPAN II	6/86
Cable Value Network	5/86
Cinemax	8/80
The Discovery Channel	6/85
The Fashion Channel (TFC)	10/87
HBO	12/75
Headline News	1/82
Lifetime	2/84
Mind Extension University	11/87
MTV	8/81
The Movie Channel	12/79
Movietime	7/87
Nickelodeon	4/79
NICK at Nite	7/85
The Nostalgia Channel	2/85
QVC Network	11/86
Request Television	11/85
Request Television 2	7/88
Shop Television Network	10/87
Showtime	7/76
SportsChannel America	1/89
SuperStation TBS	12/76
TNT (Turner Network Television)	10/88
The Travel Channel	2/87
VH-1	1/85
Viewers Choice 1	11/85
Viewers Choice 2	6/86
VISN (Vision Interfaith Satellite Network)	9/88

1/ This table was derived from Benjamin Klein, "The Competitive Consequences of Vertical Integration in the Cable Industry," (Klein study) June 1989, which was submitted as part of NCTA's comments. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

Table V

NATIONAL CABLE PROGRAMMING SERVICES
WITH NO CABLE OPERATOR OWNERSHIP INTEREST 1/

Service	Began
A&E Cable Network (Arts & Entertainment)	2/84
ASTS Satellite Network Television	5/84
Alternate View Network	10/85
American's Value Network	3/87
Cable Video Store	1/85
Country Music Television	3/83
The Disney Channel	4/83
ESPN (Entertainment & Sports Prog. Network)	9/79
EWTN (Eternal Word Television Network)	8/81
Family Guide Network	6/86
Family Net (formerly Liberty Broadcasting)	6/80
Financial News Network (FNN)	11/81
FNN/SCORE	4/85
FNN/TelShop	8/86
Galavision/ECO	10/79
Hit Video USA	12/85
Home Shopping Network I	7/85
The Inspirational Network	4/78
International Television Network	1/88
KTLA	3/88
KTVT	7/84
The Learning Channel (TLC)	10/80
TNN (The Nashville Network)	3/83
National Jewish Television	5/81
The Playboy Channel	11/82
The Silent Network	2/84
TBN (Trinity Broadcasting Network)	4/78
Univision (formerly SIN Television Network)	9/76
USA Network	9/80
The Weather Channel	5/82
WGN	11/78
WPIX	5/84
WSBK	2/88
WWOR	4/79
Zap Movies (formerly Telstar)	11/86

1/ This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

Table VI

Major MSO Cable Network Ownership 1/
(as of 12/31/89) 2/
(figures are percentages of attributable ownership rounded to tenths of a percent)

Cable Program Service	TCI	Viacom	<Time Warner> ATC	<Time Warner> Warner	Conti-nental	Cox	Com-cast	Cable-Vision	New Chan.*
Am. Movie Clcs.	50.0	-	-	-	-	-	-	50.0	-
BET TV, Inc.	14.3	-	<14.3a/>		-	-	-	-	-
Discovery Ch.	49.2b/	-	-	-	-	24.6	-	-	24.8
Fashion Ch.	36.6b/	-	-	-	-	-	-	-	-
Int'l Ca. Tech.	11.7	-	-	-	-	-	-	-	-
Movietime Ch.	10.5	-	11.0	44.0	11.0	11.4	-	-	11.3
Netlink USA	80.0	-	-	-	-	-	-	-	-
PA Educ. Comm.	11.7	-	-	-	-	-	-	-	-
Prevue Guide	20.0	-	-	-	-	-	-	-	-
Prime Time Inc.	35.0	-	-	-	-	12.5	-	-	12.5
QVC Network	22.7b/	-	9.3	25.7	e/	-	13.0c/	-	-
So. Sat. Sys.	100.0	-	-	-	-	-	-	-	-
Think Ent.	37.5	-	-	-	-	-	-	-	-
Turner B/C Sys.	14.5b/	e/	-	18.1	e/	-	-	-	-
XPress Info.	100.0	-	-	-	-	-	-	-	-
KBL Ent.	100.0	-	-	-	-	-	-	-	-
TCI N.W. CATV	100.0	-	-	-	-	-	-	-	-
Affil. Reg. Com.	60.0	-	-	-	-	-	-	-	-
Raycom Partners	50.0	-	-	-	-	-	-	-	-
Sunshine Net.	56.1	-	9.6	-	18.0	-	6.6c/	-	-
Showtime	d/	100.0	-	-	-	-	-	-	-
The Movie Ch.	-	100.0	-	-	-	-	-	-	-
MTV	-	100.0	-	-	-	-	-	-	-
Nickelodeon	-	100.0	-	-	-	-	-	-	-
VH-1	-	100.0	-	-	-	-	-	-	-
Lifetime	-	33.0	-	-	-	-	-	-	-
HA! Comedy Net.	-	100.0	-	-	-	-	-	-	-
Pacific Spts.	50.0	50.0	-	-	-	-	-	-	-
Prime Spts. NW	60.0	40.0	-	-	-	-	-	-	-
Pay-P/View Net.	-	11.0	16.7	-	12.0	12.5	11.1c/	-	11.1
Info Channel	-	-	-	-	-	-	-	-	5.7
HBO	-	-	<100.0a/>		-	-	-	-	-
Cinemax	-	-	<100.0a/>		-	-	-	-	-
Video Jukebox	-	-	-	-	-	-	-	-	16.7
Z - Ch.	-	-	-	-	33.0	-	-	-	-

1/ These data are culled from responses to letters sent to these individual companies requesting data with respect to their vertical interests. The letters were sent by the Chief, Mass Media Bureau on December 29, 1989.

Cable Program Service	TCI	Viacom	<Time Warner> ATC	<Time Warner> Warner	Conti-nental	Cox	Com-cast	Cable-Vision	New Chan.*
Amer. Shop Ch.	-	-	-	-	-	30.0	-	-	-
Spotlight	-	-	-	-	-	20.0	-	-	-
Bravo	-	-	-	-	-	-	-	50.0	-
CNBC	-	-	-	-	-	-	-	50.0	-
News 12 Long I.	-	-	-	-	-	-	-	49.5	-
PRISM	-	-	-	-	-	-	-	50.0	-
SprtsCh. Amer.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Chi.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Fla.	-	-	-	-	-	-	-	50.0	-
SprtsCh. L.A.	-	-	-	-	-	-	-	50.0	-
SprtsCh. N.E.	-	-	-	-	-	-	-	50.0	-
SprtsCh. N.Y.	-	-	-	-	-	-	-	50.0	-
SprtsCh. Ohio	-	-	-	-	-	-	-	50.0	-

* Includes NewChannels affiliated companies Metrovision, Inc. and Vision Cable Communications, Inc.

a/ Time Warner controls the indicated percent of this cable program service. Time Warner owns 82% of ATC and 100% of Warner Cable.

b/ This is the ownership figure for this cable program service as indicated in the acquisition section of TCI's letter. TCI holds a higher percentage than indicated of warrants or class B and C stocks for this cable service.

c/ Comcast supplied these percentage figures in a follow-up letter dated 2/15/90. Comcast has a beneficial ownership in the QVC Network of 28.1%.

d/ TCI has a 50% purchase of Showtime pending.

e/ This company has less than 5% interest in these cable networks.

2/ TCI has recently purchased a financial interest in the Family Channel. TCI has also announced its intention to spin off its programming interests. See letter dated January 31, 1990, to Roy J. Stewart, Chief, Mass Media Bureau from John M. Draper, Vice President and General Counsel of TCI.

Table VII

VERTICAL CONNECTION BETWEEN MAJOR CABLE PROGRAMMING NETWORKS AND CABLE SYSTEM OPERATORS 1/

Programming Network (top 25)	Subscribers (millions)	MSOs with Ownership/Equity Interest in Network	Date Began
ESPN	55.9	None	9/79
CNN	54.4	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	6/80
SuperStation TBS	54.0	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	12/76
USA Network	51.5	None	4/80
Nickelodeon/NICK at Nite	50.8	Viacom (100%)	4/79,7/85
MTV	50.4	Viacom (100%)	8/81
The Nashville Network	50.0	None	3/83
C-SPAN	49.7	2/	3/79
The Discovery Channel	49.7	TCI(49.2%), Newhouse(24.8), Cox (24.6)	6/85
The Family Channel	49.1	TCI(17%)	4/77
Lifetime	47.0	Viacom(33%), Hearst(33%)	2/84
TNT	44.5	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	10/88
A&E Cable Network	44.0	None	2/84
The Weather Channel	43.0	None	5/82
Headline News	41.8	TCI(21.8%), Time-Warner(18.1%), Viacom(<5%), et al.	1/82
Video Hits-One	34.6	Viacom (100%)	1/85
QVC Network	33.9	TCI(22.7%), Time-Warner(25.7%), Comcast (est.16%)	11/86
Financial News Network	33.8	None	11/81
WGN	30.0	None	11/78
BET	27.0	TCI(14.3%), Time-Warner (through HBO 14.3%)	1/80
American Movie Classics	26.0	TCI(50.0%), Cablevision(50.0%)	10/84
FNN/Sports	22.3	None	4/85
C-Span II	20.7	2/	6/86
The Learning Channel	20.0	None	10/80
Home Shopping Network I	19.9	None	7/85

1/ This table was derived from Cable Television Developments, NCTA Research & Policy Analysis Department, May 1990; data compiled from responses to FCC questions to cable operators and services; Tables IV, V, and VI.

2/ Cable affiliates provide 95 percent of the funding for C-SPAN, but have no owership or program control interests.

Table VIII

VERTICAL INTEGRATION: TOP FIFTEEN MAJOR CABLE PROGRAMMING NETWORKS (BY RATING) 1/

Rank	Service	Date Began	MSOs with Ownership/Equity
1	TBS	12/76	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
2	USA	9/80	none
3	ESPN	9/79	none
4	CNN	6/80	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
5	TNT	10/88	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
6	TNN	3/83	none
7	Discovery Channel	6/85	TCI(49.2%), Cox(24.6%), Newhouse(24.8%)
8	NICK at Nite	7/85	Viacom (100%)
9	Lifetime	2/84	Viacom(33%), Hearst(33%)
10	Family Channel	5/77	TCI (17%)
11	A&E	2/84	none
12	MTV	8/81	Viacom (100%)
13	Headline News	1/82	TCI(21.8%), Time-Warner(18.1%) Viacom(<5%), et al.
14	BET	1/80	TCI(14.3%), Time-Warner(14.3% through HBO)
15	Weather Channel	5/82	none

1/ This Table was derived from Nielsen's First Quarter CNAD Report, as presented in Broadcasting, June 18, 1990, at 52; data compiled from responses to FCC questions to cable operators and services; Tables IV, V, and VI.

Table IX

Access to Program Networks by Competitive Media
(Y = able to obtain; N = unable to obtain)

	(HSD)	(<----------MMDS 1/----------->)						SMATV
	NRTC a/	CableMax	Peo.Ch.	Cleve.Wire.	Tele/PR	WCTV	MAGNAVISION	NPCA
HBO	Y	N f/	N	-	-	-	N	-
Cine	Y	N f/	N	-	-	-	-	-
Show	N b/	N f/	N	-	-	-	N k/	-
TMC	N b/	N f/	N	-	-	-	-	-
AMC	Y c/	-	N g/	No resp	-	-	-	N t/
MTV	N d/	-	-	-	-	-	No resp	u/
VH1	N d/	-	-	-	-	-	-	-
Dis *	Y	-	N	-	-	-	l/	-
FNN *	N d/	-	-	-	-	-	-	-
NICK	Y	-	-	-	-	-	No resp	-
TNT	N d/	N f/	N	-	-	-	N m/	-
TNN *	Y	-	-	-	-	-	-	-
CNBC	No resp	-	-	-	-	-	-	-
CNN	Y	-	-	-	-	-	-	-
A&E *	-	-	-	No resp	-	-	N n/	-
ESPN *	e/	-	Y h/	-	-	N i/	N o/	-
SPTS CH	-	-	N	-	-	-	p/	-
HSPTS	-	-	N	-	-	-	-	-
USA *	-	-	-	-	N i/	-	N q/	v/
MovT	-	-	-	-	-	-	N r/	-
Life	-	-	-	-	-	-	s/	-

* Program network is not vertically integrated with an MSO.

a/ NRTC states that it must pay, on average, 460% more for programming than small cable companies (i.e. $10 vs. $2.25 for an 18 channel package).

b/ NRTC states that it has made an offer to Viacom for the service. NRTC has yet to receive a response.

c/ A written proposal from AMC is currently under review.

d/ NRTC has been unable to obtain this service after reasonable and repeated requests. NRTC does not define reasonable or repeated.

e/ NRTC states that ESPN offered a contract to provide service in "restricted" territories. ESPN, in its comments, defends exclusivity as a valuable and time-tested component of the television business. ESPN states that it does not generally grant exclusive distribution rights.

f/ CableMaxx has yet to secure access to this service despite its offers to post letters of credit equal to several months billing.

g/ Cablevision Systems Corp., in reply comments, states that it supplies its programming to several wireless cable operators including Peo. Ch.

h/ People's Choice is not authorized to distribute ESPN through wireless cable. People's Choice is limited to distributing ESPN only via its SMATV facilities. See footnote e.

i/ Telecable of Puerto Rico had provided its subscribers with USA Network for several months. However, USA cancelled the agreement, claiming that USA had a policy of not selling to wireless and had mistakenly believed that Telecable was a hard wired system. In their March 28, 1990, letter response to follow up questions from the Los Angeles field hearing, USA

states that it distributes its programming to MMDS systems.

j/ The WCA claims that ESPN has refused to enter into an agreement with WCTV, the wireless cable operator in Tampa Bay, justifying its actions on the grounds that WCTV's operations manager was formerly employed by a wholly unrelated wireless company that sued ESPN after ESPN unilaterally stopped providing service. ESPN, in its reply comments, states that the WCA has misstated the facts regarding ESPN's relationship with WCTV. ESPN claims that it was forced to and successfully sued Skyview, Inc. of Belleville, WI, after its president (a current WCTV minority owner and operations manager) intentionally obtained unauthorized access to the ESPN service through the use of a consumer Videocipher II decoder for use on his MMDS system from 7/1/88 to 6/24/89. The "suit" referenced by WCA relates to Skyview's counterclaims alleging violations of the Wisconsin Fair Dealership Law and antitrust law. The counterclaims were dismissed at summary judgment and an order and damage award was thereafter entered against Skyview for its illegal activity. ESPN states that, under such circumstances, it is hesitant to enter into an agreement with WCTV.

k/ Magnavision stated that in 1986, Showtime's policy was not to issue licenses to MMDS. In 1988, Showtime refused sale again stating that MMDS technology is "too new and largely untested." In 1989, Showtime stated that it was testing wireless cable carriage by selling to Microband and that, in any event, Magnavision would have to provide Showtime a substantial amount of information about Magnavision before Showtime would consider a service order.

l/ Disney wanted assurances of protection against signal piracy along with price and growth projections.

m/ TNT refused service in 1989, saying that TNT might be available in the future.

n/ A&E informed Magnavision that its policy is not to serve MMDS. It will only deal with cable systems.

o/ ESPN refused to sell to Magnavision on the basis that it would license its programming to MMDS only when MMDS operators can "present unique test cases or (markets) to us." See footnote e.

p/ General "red-lining" to zip codes where cable exists.

q/ Refused to sell in 1988 because of its stated fear that MMDS has signal security problems.

r/ Movietime declined to sell and stated that it is currently reviewing its sales policy and its guidelines for affiliation.

s/ Must purchase (at a substantial markup) from cable operator in the same area.

t/ Refused to sell at all to the private cable industry. However, commenter states that service might become available. Cablevision states that it does sell its programming to the private cable industry.

u/ SMATV pays for MTV, NICK, and VH1 on a per subscriber basis, whereas cable operators receive discounts for a combined purchase of all three services.

v/ USA requires SMATV to pay per home passed, whereas cable pays per subscriber.

1/ The information about Magnavision was obtained from the comments it submitted. The information about the other MMDS systems was obtained from the comments submitted by the Wireless Cable Association (WCA), a trade association of MMDS operators.

Table X

Wireless Cable Systems' Access to Specific Program Networks 1/

	<---------Cable Program Network---------->					
Wireless Systems:	HBO	ESPN	Showtime	TNT	Sports Channel	Regional Sports Channel
Carry Unrestricted	5	11	6	1	4	5
Carry Restricted	1	6	0	0	1	0
Request Pending	1	1	0	0	1	0
Unavailable	25	14	26	31	26	27
Total Systems Surveyed	32	32	32	32	32	32

Note: The wireless cable system carrying TNT, PacWest in Sacramento, was recently notified that service would be terminated.

Table XI

Sample Rate Comparisons Between Wireless Cable and Cable 1/
(cents per subscriber)

	Top Wireless Rate	Top Cable Rate	Wireless Premium
CNN	$.50	$.28	78.6%
USA	.38	.23	65.2%
Nickelodeon	.35	.22	59.1%
MTV	.35	.22	59.1%
Nashville	.35	.20	75.0%
A&E	.15	.11	36.4%
Headline News	.50	.00	-

1/ Information obtained in the comments of the Wireless Cable Association.

Table XII

Rate Comparisons: Mid-Atlantic Communications' Cable Systems vs. SMATVs 1/

Programmer	SMATV	Cable System	SMATV Premium
HBO *	$6.25 per sub **	$4.00/mo. per sub a/	56.2%
Cinemax *	6.50 per sub **	3.86/mo. per sub	94.5%
Nick *	0.29 per sub	0.17 per sub	70.5%
MTV *	0.29 per sub	0.17 per sub	70.5%
USA	0.18 per passing	0.18 per sub	not comparable
FNN	0.17 per sub	0.055 per sub	209%
HTS	1.50 per sub	0.75 per sub	100%
CNN *	0.33 per sub	0.25 per sub	32.0%
ESPN *	0.47 per sub	0.32 per sub	46.9%

1/ Information obtained from the comments of the National Satellite Programming Network, Inc., et al.

a/ Sub = subscriber

* Cable network has vertical relationship with a cable MSO.

** Sold by cable operator

Table XIII

MSO CARRIAGE OF OWNED NETWORKS 1/

Network	MSO with Ownership Ints. in Network	Carriage Percentage By Systems with Network Ownership Interest	Carriage Percentage By Systems without Network Ownership Interest	Difference in Carriage Percentage
BET	TCI, Time Warner	53.6%	41.8%	11.8%
CNN	(a)	99.5	99.4	0.1
CVN	(b)	78.4	25.0	53.4
DSCV	(c)	88.1	85.1	3.0
HLN	(a)	80.9	73.3	7.6
LIF	Viacom, Hearst	90.0	90.0	0.0
MTV	Viacom	90.0	96.4	-6.4
NAN	Viacom	100.0	91.5	8.5
NICK	Viacom	100.0	100.0	0.0
VH1	Viacom	80.0	70.5	9.5
WTBS	(a)	93.6	92.2	1.4
Average of Basic Networks		86.7%	78.7%	8.1%
AMC*	Cablevision Systems, TCI, United Cable	62.7	29.2	33.6
BRVO*	Cablevision Systems	100.0	17.2	82.8
CMAX	Time Warner	96.2	79.7	16.5
HBO	Time Warner	100.0	99.7	0.3
SHOW	Viacom	90.0	83.8	6.2
TMC	Viacom	90.0	58.7	31.3
Average of Premium Networks		89.8%	61.4%	28.4%
Average of All Networks		87.8%	72.6%	15.3%

1/ This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

(a) TCI, Time Warner, United Artists, United Cable, Heritage, TCI-Taft, Cablevision Systems, Continental, Jones Intercable, Lenfest, Sammons, Storer, Times Mirror, TKR Cable, Viacom, Telecable, Centel, Scripps Howard (Telescripps).

(b) TCI, Time Warner, Cablevision Systems, Colony, Continental, Newhouse, Rogers Communications, Sammons, Times Mirror, Viacom, Daniels & Associates, Cooke Cablevision, American Cablevision, Adam Corporation, United Artists, Heritage.

(c) TCI, Cox, Newhouse, United Cable.

* Hybrid services (offered both as basic and premium).

Table XIV

CARRIAGE BY VERTICALLY INTEGRATED MSOs OF NETWORKS IN WHICH THEY HAVE NO OWNERSHIP INTERESTS 1/

Network	Vert. Integrated MSO's w/no Ownership Ints. in the Particular Network	Carriage Percentage By Vertically Integrated MSO's w/no Ownership Interests in the Network	Carriage Percentage By Systems with No Ownership Interests in Any Networks (153 Systems)	Difference in Carriage Percentage
AEN	TCI, T/W, Viacom, CVS	87.9%	81.7%	6.2%
BET	Viacom, CVS	50.0	31.4	18.6
CSPN*	TCI, T/W, Viacom, CVS	94.8	71.2	23.6
DSCV	T/W, Viacom, CVS	85.8	85.0	0.0
ESPN	TCI, T/W, Viacom, CVS	100.0	100.0	0.0
FNN	TCI, T/W, Viacom, CVS	74.1	63.4	10.7
LIF	TCI, T/W, CVS	96.2	79.1	17.1
MTV	TCI, T/W, CVS	98.1	93.5	4.6
NAN	TCI, T/W, CVS	87.0	94.4	-7.4
NICK	TCI, T/W, CVS	100.0	100.0	0.0
TNN	TCI, T/W, Viacom, CVS	89.7	93.5	-3.8
TWC	TCI, T/W, Viacom, CVS	82.8	72.5	10.2
USAN	TCI, T/W, Viacom, CVS	99.1	96.7	2.4
VH1	TCI, T/W, CVS	62.3	69.3	-7.0
WGN	TCI, T/W, Viacom, CVS	54.3	54.2	0.1
Average of Basic Networks		84.5%	79.7%	5.1%
AMC**	T/W, Viacom	47.2	21.6	25.7
BRVO**	TCI, T/W, Viacom	17.9	13.1	4.8
CMAX	TCI, Viacom, CVS	77.8	76.5	1.3
DSNY	TCI, T/W, Viacom, CVS	97.4	92.8	4.6
GALA**	TCI, T/W, Viacom, CVS	9.5	3.3	6.2
HBO	TCI, Viacom, CVS	100.0	99.3	0.7
SHOW	TCI, T/W, CVS	84.0	75.8	8.1
TMS	TCI, T/W, CVS	50.0	56.2	-6.2
Average of Premium Networks		60.5%	54.8%	5.6%
Average of All Networks		76.5%	71.4%	5.2%

1/ This table was derived from the Klein study. The Klein study was compiled based on information obtained in 1988 and 1989. Klein's table was edited to reflect certain ownership changes since that time.

* Cable affiliates provide 95 percent of the funding for C-SPAN, but have no ownership or program control interests.

** Hybrid services (offered both as basic and premium).

Table XV

History of Major MSO Cable Network Ownership Since 1975

(table generated from responses of the MSO's listed below that were sent letters requesting information regarding their cable programming interests)

Year	TCI	Viacom	<Time Warner-> ATC	<Time Warner-> Warner	Conti-nental	Cox	Com-cast	Cable-Vision	New Chan.
1975	-	-	-	a/	-	-	-	-	-
1976	-	b/	-	-	-	-	-	-	-
1977	-	-	-	c/	-	-	-	-	-
1978	-	-	d/	-	-	-	-	-	-
1979	e/	f/	-	g/	-	-	-	-	-
1980	-	-	h/	i/	-	-	-	-	-
1981	-	-	j/	k/	-	l/	-	-	-
1982	m/	n/	-	-	-	-	-	o/	-
1983	-	p/	-	q/	-	-	-	r/	-
1984	s/	t/	-	u/	-	v/	-	w/	-
1985	-	x/	y/	z/	-	-	-	aa/	-
1986	bb/	cc/	dd/	ee/	-	ff/	-	gg/	hh/
1987	ii/	-	jj/	kk/	ll/	mm/	nn/	oo/	pp/
1988	qq/	rr/	ss/	tt/	uu/	vv/	ww/	xx/	yy/
1989	zz/	aaa/	bbb/	ccc/	ddd/	eee/	fff/	ggg/	hhh/

Footnotes

1975

a/ **Warner** created the Movie Channel, originally known as the Star Channel.

1976

b/ Showtime Entertainment formed as a wholly-owned subsidiary of **Viacom International Inc.**

1977

c/ Pinwheel was launched by **Warner** as a young people's (ages 2-15) entertainment service.

1978

d/ **Time Warner** has wholly owned HBO during the entire period. HBO created Take 2 in December 1978 until it closed operations September 1980.

1979

e/ **TCI** became founding investor in Black Entertainment Television, Inc.

f/ In January, 1979, Showtime Entertainment became a partnership of **Viacom International** and Teleprompter, with each company owning 50%.

g/ Pinwheel was relaunched by **Warner** as Nickelodeon.

1980

h/ **Time Warner**-owned HBO created Cinemax in August 1980.

i/ Warner Amex Satellite Entertainment Company ("WASEC") was formed to market and distribute programming interests owned jointly by **Warner** and American Express Company ("AMEX").

1981

j/ **Time Warner** acquired 1/3 interest in USA network.

k/ MTV was launched in August by a partnership of subsidiaries of **Warner** and American Express as a rock music video service.

l/ **Cox** acquired 20% of Spotlight December 1981.

1982

m/ **TCI** acquired 11.7% of the Pennsylvania Educational Communications Systems.

n/ In November, **Viacom** acquired from the subsidiary of Group W its 50% partnership interest in Showtime Entertainment. Also, Viacom and two individuals (Mr. Jeffery Reiss and Dr. Art Ulene) formed Cable Health Network, Inc. Viacom was a minority stock-holder but assumed a significant management and financial role in the venture and had rights to increase its ownership. In June, the Cable Health Network was launched, producing programming related to health and life-style issues.

o/ **Cablevision's** programming arm (Rainbow Program Enterprises (RPE)) and Playboy Enterprises create a joint venture to own and operate Escapade (later renamed the Playboy Channel).

1983

p/ In November, Cable Health Network, Inc., owned in part by **Viacom**, became a one-third general partner with a one-third management interest in a partnership with Hearst/ABC Services (itself a partnership of subsidiaries of the Hearst Corporation and American Broadcasting Companies Inc.). The Cable Health Network and Daytime Service programming networks were thereby merged into a new programming service called Lifetime. Also, in 1983, **Viacom** entered into an agreement with subsidiaries of Warner Communications Inc. ("Warner") and the American Express Company ("American Express") whereby effective in September, 1983 the business of Showtime Entertainment was merged with the business of the The Movie Channel (formerly operated by Warner and American Express) as Showtime/The Movie Channel Inc. ("ST/TMC") (now SNI). (The Movie Channel commenced operation in 1973 as the The Starchannel and was first distributed nationally as The Movie Channel in 1979.) Viacom contributed to this venture its 100% ownership in Showtime Entertainment in exchange for 50% of the equity in ST/TMC and other consideration. Warner held 40.5% and American Express held 9.5% of the remaining equity in ST/TMC.

q/ In September 1983, Warner and Viacom formed a new corporation, Showtime/The Movie Channel. Also, Warner Amex Satellite Entertainment Co. created Home Sports Entertainment (HSE) internally in 1983.

r/ Effective January 1, 1983, Cablevision's program affiliate Rainbow Programming Enterprises (RPE) formed a partnership with New England Prime Cable Network which acquired all the assets of PRISM New England, a sports-movie service serving New England. The movies were discontinued and the service was renamed SportsChannel New England. RPE acquired a 40% pre-payout and 50% post-payout interest in the service consisting of both general and limited partnership interests. On June 1, 1983, sold to subsidiaries of the Washington Post, 50% of RPE's interest in SportsChannel New York and SportsChannel New England. In October 1983, RPE sold its remaining interest in the Playboy Channel to Playboy Enterprises, but continued to distribute the Playboy Channel until April 1986. On October 18, 1983, RPE and a subsidiary of the Washington Post Company formed a partnership which acquired The PRISM Company, the owner of PRISM, a sports-movie service serving the Philadelphia area. RPE acquired a 50% general partnership interest in the service.

1984

s/ TCI sold interest in Spotlight Service, Inc.

t/ In February, ST/TMC, owned by Viacom, acquired the assets of the Spotlight Partnership from its cable operator owners (Cox Cable Communications, Inc., TCI, Storer Communications Incorporated, and Times-Mirror Cable Television,Inc.). Spotlight was a pay programming service marketed to the cable systems owned by the cable operator owners. Pursuant to the asset purchase, subscribers to the Spotlight service became subscribers (subject to their approval) to either Showtime or The Movie Channel. Also, in 1984, Viacom launched Lifetime.

u/ On July 16, 1984, Warner sold Home Sports Entertainment (HSE) to a venture controlled by Houston Sports Associates. The assets of MTV, VH-1 and Nickelodeon were transferred to a new corporation, MTV Networks, Inc. ("MTVN"). Pursuant to a public offering, 5,125,000 shares of MTVN were sold to the public in August. Warner and American Express collectively retained ownership of 66.1% of the outstanding capital stock of MTVN.

v/ Cox sold holdings in Spotlight.

w/ On January 1, 1984, RPE, owned by Cablevision, and a subsidiary of the Washington Post Company formed a partnership which entered into a rights agreement with, and succeeded to the business of SportsVision of Chicago, which operated a sports programming service in the Chicago area called SportsVision.

1985

x/ **Viacom** increased its ownership in Cable Health Networks, Inc. (the one-third general partner in the Lifetime service) to 80%. Also, in 1985, Viacom purchased from Warner the 50% equity interest in ST/TMC that it did not then own (Warner had previously purchased the 9.5% interest of American Express). In January, VH-1 was launched by MTV as a music video service, programmed to complement MTV. In July, Nick-at-Nite was launched by Nickelodeon extending Nickelodeon's service to 24-hours for certain subscribers. Nick-at-Nite serves general audiences. In November, **Viacom** acquired from Warner 66.5% of the ownership interest in MTV Networks Inc. ("MTVN"), owner and operator of MTV, Nickelodeon and VH-1. (Warner had previously purchased from American Express its interest in the venture which operated these services). The remaining 33.5% of MTVN shares were publicly held. In November, **Viacom** through a division of SNI, initiated a national satellite delivered pay-per-view service, Viewer's Choice, which enabled cable subscribers to view theatrical features and special events on a program-by-program basis.

y/ HBO Inc., owned by **ATC**, began acquiring stock in Black Entertainment Television.

z/ In August of 1985, **Warner** acquired AMEX's interest in MTVN. Warner's interest in MTVN was sold to Viacom in November of 1985.

aa/ On January 25, 1985, RPE, owned by **Cablevision**, and The Washington Post Company sold to subsidiaries of CBS one-third of their interests in SportsChannel New York, SportsChannel New England, PRISM and SportsChannel Chicago. This transaction left RPE with a 33.5% general partnership interest in SportsChannel New York, a one-third general partnership interest in PRISM and SportsChannel Chicago and 13.33% pre-payout and 16.66% post-payout interest in SportsChannel New England. Also, on January 25, 1985, RPE sold to subsidiaries of CBS, 50% if RPE's interests in AMC and Bravo, leaving RPE with a 50% general partnership interests in such services.

1986

bb/ **TCI** acquired 49.22% of the Discovery Channel; 100% of X*press Information Services, Ltd.; and, 33.3% of the Z Channel (premium sports and movie channel). Acquired and sold Uptown (premium channel).

cc/ In March, **Viacom** acquired the remaining 33.5% of the shares of MTVN, a process whereby MTVN became a wholly-owned subsidiary of Viacom (MTVN was subsequently merged into Viacom and currently exists as one of its operating divisions, MTV Networks). In June, a second national pay-per-view channel, Viewer's Choice 2, was launched by Viewer's Choice.

dd/ **ATC** began acquiring stock in the QVC Network and the CVN Network. HBO Inc. created Festival and launched it in May.

ee/ **Warner** and Investors acquired equity interest in CVN over the period from October 21, 1986 through May, 1989.

ff/ **Cox** acquired 15% of America's Shopping Channel and 9.9% of the Discovery Channel.

gg/ In December 1986, **Cablevision** acquired certain limited partnership interests in RPE from outside investors, so that Cablevision now owns a 95.68% pre-payout interest and a 94.77% post-payout interest in RPE.

hh/ **NewChannels** acquired over 3 million shares in the Discovery Channel.

1987

ii/ **TCI** acquired 50% of American Movie Classics.; 36.6% of the Fashion Channel Network, Inc.; 10.5% of the Movietime Channel, Inc.; 22.7% of QVC Network, Inc.; and, 37.5% of Think Entertainment. Acquired interest in Turner Broadcasting System, Inc. Launched KBL Entertainment, Inc. (regional sports). Sold interest in the Z Channel.

jj/ **ATC** began acquiring stock in the Pay-Per-View Network, Inc.; Turner Broadcasting; and, the Fashion Channel; sold interest in the USA Network.

kk/ **Warner's** interest in TBS was acquired over a period beginning in June, 1987 through May, 1988.

ll/ **Continental** acquired 12% of Viewers Choice, Inc.

mm/ **Cox** acquired an additional 15% of America's Shopping Channel; 3.6% of the Discovery Channel; and, an initial 20% of Viewers Choice.

nn/ **Comcast** acquired various amounts of stock in the QVC Network during May and June.

oo/ On January 1, 1987 and August 25, 1987, **Cablevision's** programming affiliate Rainbow Programming Holdings, Inc. (RPHI) acquired from The Washington Post Company and CBS, all the foregoing interests previously sold. As a result, collectively, RPE and RPHI owned 100% of the partnership interests in such companies. Also on January 1, 1987, RPE sold to a subsidiary of Tele-Communications, Inc. 50% of RPE's interest in AMC, leaving RPE with a 50% general partnership interest.

pp/ **NewChannels** acquired another 4 million shares in the Discovery Channel and 5.7% of the outstanding shares of the Information Channel. NewChannels was an original investor in the Pay-Per-View Network when it purchased 20% of the shares in July.

1988

qq/ **TCI** acquired 20% of Prevue Guide, Inc.; 100% of Southern Satellite Systems, Inc.; TEMPO Sound, Inc. and TEMPO Television, Inc.

rr/ In November, certain assets of Viewer's Choice 1 and 2 were combined with Home Premiere Television and **Viacom** thereby acquired what is currently a one-ninth interest in PPVN which through a subsidiary owns

and operates Home Premiere Television (now called Viewer's Choice), a national pay-per-view service. Together with Viacom, PPVN is owned directly or by subsidiaries of these other companies: Continental Cablevision Investments, Inc.; Cox Communications Inc.; Telecable Corporation; Newchannels Corporation; ATC-PPV Inc.; Walt Disney Pictures and Television; Times-Mirror Cable Television; and Comcast Cable Communications, Inc. (The latter three entities became stockholders in PPVN subsequent to Viacom's obtaining its original one-sixth interest.) Viacom is one of nine board members. Also in 1988, Viacom further increased its ownership in Cable Health Network, Inc. to 100%.

ss/ **ATC** acquired interests in Movietime, Inc. and the Sunshine Network.

tt/ **Warner's** interest in Movietime was acquired over a period beginning February 16, 1988 through November 1, 1989.

uu/ **Continental** acquired 11% of the Movietime Channel, Inc.; 18% of the Sunshine Network, Inc.; and, 33% of the Z-Channel Limited Partnership.

vv/ **Cox** acquired an additional 0.3% of the Discovery Channel; sold 20% of common voting stock of Viewers Choice but lent company over $2 million to retain a total of 12.5% ownership; and, acquired an initial interest in Movietime.

ww/ **Comcast** purchased 14,000 shares of common stock in the Sunshine Network, Inc.

xx/ On April 19, 1988, the partners not affiliated with RPE, owned by **Cablevision**, and RPHI withdrew from the partnership in SportsChannel New England. As a result, RPE and RPHI collectively own 100% of the general and limited partnership interests in the service.

yy/ **NewChannels** acquired over 3 million shares in the Movietime Channel Inc.; acquired additional shares in the Pay-Per-View Network; and acquired stock in the Video Jukebox Network Inc.

1989

zz/ **TCI** acquired 60% of Affiliated Regional Communications, Ltd.; 11.7% of International Cablecasting Technologies, Inc. Founding investor in Prime Time Tonight, Inc. (35%). Launched TCI Bay Area Sports, Inc.; TCI Northwest Cable Sports, Inc.; and, TCI Sports, Inc. Sold TEMPO Sound, Inc. and TEMPO Television, Inc.

aaa/ **Viacom** and TCI entered a letter of intent with respect to TCI's purchase of a 50% equity interest in the business of SNI (formerly ST/TMC). Also, in 1989, Viacom (on behalf of a subsidiary yet to be formed) and TCI Bay Area Sports, Inc. agreed to form a partnership to operate a regional sports network in the San Francisco Bay Area and the surrounding counties. In the same month Viacom and TCI Northwest Cable, Inc. agreed to enter into a separate partnership to operate a regional sports network in the Seattle/Tacoma, Washington area. Definitive agreements are currently in negotiation. The PSN service

for San Francisco was launched in September 1989, sports programming, which at the time was not formally part of Prime, was launched in 1988 in Seattle/Tacoma prior to a formal agreement between Viacom and TCI to form the Prime partnership.

bbb/ Festival ceased operations in December. In October, **ATC's** interest in CVN were converted to QVC as a result of the merger of QVC and CVN. The Fashion Channel ceased operation. HBO created the Comedy Channel and launched it in December.

ccc/ On October 31, 1989, **Warner's** interest in CVN were converted into an interest in QVC pursuant to a merger of CVN with QVC. Warner's interest in QVC was acquired over a period from July through December, 1989. Also, in 1989, HSE was sold to a partnership made up of affiliates of Telecommunications, Inc. and Daniels & Associates. Warner holds 23,171 shares of Class B common stock of The Fashion Channel Network, Inc., representing approximately 0.93% of the outstanding shares. The Fashion Channel ceased operations in 1989.

ddd/ **Continental** sold holdings in the Z-Channel.

eee/ **Cox** acquired an additional 10.76% of the Discovery Channel resulting in a total ownership of 24.6%; lent America's Shopping Channel over $3 million; acquired additional stock in Movietime resulting in a 11.4% total interest; and, acquired an initial 12.5% interest in Prime Time Tonight.

fff/ **Comcast** acquired additional stock in the QVC Network; purchased stock and note in the Pay Per View Network Holding Co.

ggg/ On March 20, 1989, RPHI (a subsidiary of **Cablevision**) acquired certain of the assets of Z Channel a sports-movie service serving the Los Angeles area. The movies were discontinued and the service was renamed SportsChannel Los Angeles. On April 20, 1989, RPHI acquired a 49.5% general partnership interest in CNBC in connection with NBC's acquisition of interests in programming services from RPI and RPE described below. The sports channel in Chicago (SportsVision) continued until 1989 at which time the service was renamed SportsChannel Chicago. RPE acquired a 50% general partnership interest in the service. Also on April 20, 1989, RPE and RPHI sold to subsidiaries of NBC, 50% of RPE's and RPHI's respective interests in all the SportsChannel services, Bravo and News 12 Long Island, leaving RPE and RPHI collectively with a 50% general partnership interest in SportsChannel New York, Prism, SportsChannel Chicago, Sports-Channel Florida, SportsChannel Ohio, SportsChannel Los Angeles, SportsChannel America, Bravo and News 12 and a 50% general and limited partnership interest in SportsChannel New England.

hhh/ **NewChannels** acquired more stock in the Movietime Channel now totaling 11.3% of the outstanding stock; acquired more stock in the Video Jukebox Network Inc. now totaling 16% of the outstanding shares; acquired more stock in the Discovery Channel now totaling 24.8% of the outstanding shares; and acquired 12.5% of the outstanding shares in Prime Time Tonight.

SURVEY DATA ON SELECTED "COMPETITIVE" CABLE MARKETS
May 1990

	Year Begun	Homes in Franchise Area	% with Access to Two Systems	No. of Basic Subs.	Basic Rate	No. of Channels on Basic	Cents per Channel	Off Air in Mkt.	Rec'd. Off Air
Allentown, PA		39,000	100	~39,000				5	
Service Electric	1950's				$12.95*	25*	51.8		15*
Twin County	1950's				10.00*	21*	47.6		16*
Vidalia, GA		~6,000	83					3	
TCI	1972			3,660	12.75	31	41.1		6*
					9.75**		31.5		
Southland	10/88			2,310	15.75	40	39.4		NA
Citrus County, FL***		~25,000	~25					NA	
Telesat	7/87			6,407	9.95	40*	24.9		13*
CCF	NA			20,548*	9.95	33*	30.2		12*
Orange County, FL		NA	~20					6	
CCF	NA				16.95	32	60		8
					8.95****		28.0		
Cablevision Ind.	~1982				13.95	44	31.7		9
					7.95****		18.1		
Telesat	1986			12,514	11.95	51	23.4		6

"COMPETITIVE" CABLE MARKETS--Continued

"COMPETITIVE" CABLE MARKETS--Continued

	Year Begun	Homes in Franchise Area	% with Access to Two Systems	No. of Basic Subs.	Basic Rate	No. of Channels on Basic	Cents per Channel	Off Air in Mkt.	Rec'd. Off Air
Huntsville, AL		NA	25					4	
Comcast	1954			42,000	5.00	32	15.6		9
Cable America	1986			18,000	11.95	60	19.9		9
Mesa, AZ		107,723 passed by	10					5	
Dimension	mid-70's	Dimension		42,279	18.95	36	52.6		5
Cable America	late 1988			3,444	13.95	56	24.9		5
AVERAGE FOR "COMPETITIVE" SAMPLE							38.2		
AVERAGE FOR ALL CABLE MARKETS, December 31, 1989 (from 1990 FCC-GAO study, see Appendix F, table 1B)							58.0		

SOURCE: Except as indicated, all data are from telephone interviews, 5/17/90.

* 1989 Television Factbook.

** For subscribers who hooked up prior to 2/1/90.

*** Telesat Filings.

**** Overbuilt areas only. From Telesat filings.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

Thursday, July 26, 1990

Statement of FCC Chairman Alfred C. Sikes
on the
Commission's Cable Television Report

As my colleagues have said, and the report indicates, the data we have collected presents a mixed picture regarding cable price increases. As has been true with prior GAO studies, this report contains data for both critics and defenders of cable developments since the 1984 Act. And, as is true of national studies there are always a number of deviations from the norm. If a customer feels victimized, regardless of the industry, national statistics provide no consolation.

While our data collection and interpretations are helpful, one thing is clear. Cable operators do not face head to head competition in more than a handful of markets. And, in my view the end result is equally clear. As has been demonstrated in communications market after communications market, as competition increases both costs and prices go down. Head to head competition places an exceptionally high premium on cutting costs and putting the customer first. Study after study, in sector after sector, has identified the extraordinary cost and price-cutting pressure that exists in highly competitive markets. Those same studies demonstrate that highly competitive markets also spur product differentiation, innovation, and service quality.

So those who may want to read this report as justifying rate reregulation would be wrong. The centerpiece of this report is competition not reregulation. My colleagues and I are of one mind: competitive markets and competitive markets alone will in the final analysis force prices toward true costs.

Competition, then, is the linchpin for consumers. Where it exists they can be confident they are getting good value.

Competition in the cable or multichannel video marketplace is controversial. Many say it is not possible to have competition because this is a natural monopoly business. And, many cable franchising authorities who, in return for granting and working to sustain exclusive franchises, have gotten a number of tangible benefits, do not want competition.

Earlier this month, the Wall Street Journal recounted the sad experience in Sacramento, California, where two entrepreneurs seeking to compete ended up in a court battle with both the city

and what the Journal called the "officially anointed cable operator."

And, it was only after running an almost endless litigation gauntlet that cable competition in Sacramento was allowed. Now, incidentally, the city reportedly has changed its mind about the virtues of monopoly franchises, and is cheering the competition on.

The end result of this "natural monopoly" attitude and obstructionist actions has been that many despair of ever seeing competition develop and consequently choose government regulations. I think that is the wrong approach.

As this reports shows and concludes, the cable or multichannel video market is in transition. Cable was, at one time, a retransmission business with clear revenue limitations. Today, cable is that and a lot more. Cable networks together deliver the same audience as a broadcast network and the trends for gaining more ground are clear. As the popularity of the cable networks grows, the cable operator's second stream of income, advertising revenue correspondingly grows. And, technologically the industry is on the threshold of being able to deal more selectively with customers, thus giving them the opportunity to develop many new products. In fact, pay per view revenue growth is second only to advertising.

It is this promise of financial rewards that literally has resulted in an outbreak of lawsuits asking the courts to stop franchise authorities from slamming the door on competition.

These developments, and the insight gained from watching the remarkable developments in competitive communications markets, have caused the Commission to be of one mind. Legislation should be passed which limits municipal authority to erect or sustain entry barriers and which prohibits an "unreasonable refusal to grant a second franchise." To use the code word of the day there should be more "deregulation."

Additionally, and importantly the Commission has recommended that vertically integrated companies not be able to use their market power to deny programming to those who seek to compete against them.

There is another area of regulation that has also concerned me. The compulsory copyright license has, in my view, become an impediment to the long term health of the video industry. It distorts market developments by dictating both the terms and conditions of many program relationship. It undermines exclusivity and creates an artificial price for broadcast

programming distributed by cable. While the Commission has again recommended the elimination of the compulsory license for distance signals, it noted, that without competition for broadcast program distribution, its total elimination today would generally not help the broadcaster get true value for his/her product. I agree with this finding but want to add that, in my view, the continuation of the "Compulsory License", will over the long term harm not help the video marketplace.

Finally, I would like to say a few words about rate regulation. While we have concluded that three signals no longer constitute "effective competition" we have, appropriately, deferred to the Congress which is working actively as we meet on cable legislation. We believe the potential harm of two conflicting approaches to rate regulation being taken by different government entities merits holding back.

We hope, however, that the Congress will see, through our section on "effective competition", and the alternatives that are presented, that there are ways to protect consumers without a high degree of reregulation and that the exercise of any rate regulation authority should be at the local not national level. There is certainly nothing wrong with establishing a federal standard regarding rate regulation. But when the authority is exercised it should be done locally as underlying cost circumstances vary widely.

Adopted July 26, 1990

Statement of Commissioner James H. Quello

In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service

This item today is proof that, regardless of individual viewpoints and prerogatives, the collegial process is alive and well at the FCC.

This comprehensive report represents intensive individual input from Commission bureaus, offices and Commissioners' staff members.

I wish to commend all my fellow Commissioners for their efforts in achieving a reasonable consensus to this complex subject. I commend Commissioner Marshall's contribution of thought-provoking diverse viewpoints for consideration and inclusion in the final report. During the initial, and inevitable, churn I nominate Comr. Duggan for an FCC equivalent of the Nobel peace prize for his key role in achieving agreement among the various individual Commissioners. And, we all know that the Chairman ultimately assumes the principal credit or all the blame for FCC actions -- so a salute to his statesmanship and leadership in this process. And this leaves you and me, Andy, with strong individual opinions that are reflected in portions of this report -- I'm going to steal or paraphrase Commissioner Barrett's statement from our last FCC meeting: "I don't think it matters much what we think, this item will be principally decided in Congress and the Courts."

However, I do want to take this opportunity to briefly bottom line some of my opinions. The final cable rate formula, if not legislated by Congress, could be influenced by an FCC revised definition of effective competition. This is being addressed in a separate docket -- yet it is a major issue for our recommendations to Congress. I feel compelled to express my views on the critical subject as I'm the only Commissioner here who voted for a three station TV standard as establishing effective competition. At that time I expressed grave doubts and facetiously characterized our efforts as "defective" competition. However, there didn't seem any place else to go at that time and I reluctantly voted for it. Also, must carry and channel positioning were securely in place; cable was not aggressively selling TV advertising in competition with local stations, there were many fewer cable channels six years ago, and cable penetration was considerably less than the 60% reported last month.

Under these circumstances, I believe it appropriate for Congress and the FCC to revisit the 1984 Cable Act and update its provisions to serve a drastically changed multi-channel cable TV marketplace of the 1990s.

I'm merely going to repeat what I have been saying in public speeches the past three years: In my view the 3 station standard for effective competition is outdated and totally inadequate in the varied multi-channel TV cable marketplace of today--particularly when you consider that cable isn't even legally required to carry the three stations!

In my mind the most effective competition to existing cable is another multi-channel provider. In this item today we encourage development of multi-channel marketplace competition by emphasizing program access for potential competitors. As of today MDS, MMDS and DBS are more potential than actual competitors. They require much more time and development to evolve as cable competitors in the marketplace of today.

So today and for the immediate future there is very little viable effective competition for cable with its 60% market penetration. The action word here is "effective."

I understand there is a comprehensive cable-TV agreement for must carry and channel positioning that will probably be incorporated into legislation.

At this time I believe it appropriate to have must carry and channel positioning as first priority items.

However, I believe to establish a truly equitable TV marketplace in the future, Congress will have to eventually revoke the compulsory license and require retransmission consent to transmit the broadcaster's program product.

The compulsory license served an essential purpose in the early days of cable when cable provided a basic TV service to thousands of unserved or underserved small towns. My home town of Laurium is an example. Only one poor TV signal was available from Marquette, Michigan. Cable brought basic TV service to the grateful populations of Laurium and hundreds of other Upper Peninsula towns. In my home town most people would have preferred cable TV service over phones or bathtubs. (Fortunately, they weren't required to make the choice.)

However, I can't possibly conceive that it was ever intended by government officials that local broadcasters in hundreds of larger cities would be required to provide a free program subsidy that delivers 60-70% of the cable audience for a cable system aggressively selling TV advertising in competition with them. This must be corrected at some future date.

Now for the rest of the story -- Cable has provided a desirable, popular service. It has been a dynamic growth industry. It has invested heavily in new plant, new technologies and many additional channels. I have often said, and I repeat, I personally like cable. I won't stay home without it. I particularly like CNN, ESPN, TNT, C Span, A and E, American Movie Classics and the Discovery channel.

I think it is essential that any rate regulation eventually established by Congress or proposed by the FCC represent a free enterprise solution with the least intrusive government intervention so that cable can continue to explore advanced technology and to expand its popular service. I support our report today that recommends a general preference for competition over regulation. I understand we will propose specific rate formulas in our effective competition report this fall.

Briefly a word about vertical and horizontal limitations: I believe any limitations should be enacted only to correct abuses.

The occasional abuses today must be considered in the context of the public benefits of economies of scale for a dynamic growth industry.

There are many other detailed facets of this comprehensive item but I reserved my bottom line comments for items that were uppermost in my mind. My comments are formed from a perspective of 16 years on the FCC witnessing the dynamic development of cable, the essential free over-the-air service of TV, and trying to be an objective practical regulatory referee in the long standing cable-TV conflict. Also, I have a longtime working knowledge of the highly respected executives in both industries.

In the future I foresee more areas of agreement and fewer areas of bitter competitiveness between these two industries that play such a prime role in informing and entertaining America. In fact, there is emerging now more joint annual conventions by state broadcasting and state cable conventions. I hope our actions today will help foster future cooperation.

Cable and broadcasting have presented the American public with the most comprehensive and best telecommunications service in the world. I don't think public interest is served by making either of them any less than they are. Congress in its wisdom is taking progressive steps to preserve their service by assuring a reasonable rate structure and an equitable broadcasting marketplace that best serves all American consumers.

Thanks for indulging me this opportunity, Mr. Chairman and colleagues -- I rarely have lengthy comments but I have lived with this issue a long time.

July 26, 1990

SEPARATE STATEMENT
OF
COMMISSIONER ANDREW C. BARRETT

In Re: Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, MM Docket No. 89-600

This Report demonstrates a consensus of Commission views. The Report emphasizes our ultimate goal of encouraging competition as a solution to the problems currently faced by cable consumers and competitors. I believe our review process, which entailed three public hearings and the comments filed in our Notice of Inquiry, resulted in a strong and balanced document that accurately reflects the record before this agency. I recognize that both houses of Congress are working diligently towards adoption of cable legislation later this year. I am hopeful that Congress will find our recommendations useful in their deliberations.

I write separately to voice my concern over the "effective competition" section of the Report.[1] Therein, the Commission sets forth its intention to move forward on revisions of the effective competition standard if Congress does not act on this issue. While I agree that the current three over-the-air broadcast signal standard is no longer valid, I am concerned that the Commission does not currently possess a sufficient record to redefine this standard. Thus, before the Commission seeks to define a new standard, it would be useful to issue a Further Notice of Proposed Rule Making to permit comment on all of the proposals listed in our Report. I also think it is important to seek comment on any alternative proposals developed during Congressional markups.

In addition, I am not convinced that simply redefining our effective competition standard is the best course of action. I have listened intently to the public comments on all sides of this issue. In particular, I attended all three FCC cable field hearings. It would appear that the major concern from interested parties is with a few "bad actors" who engaged in price gouging. Thus, I am concerned that this Commission not recommend a broad-based reregulatory action that could affect an entire industry; especially if the problems being addressed are premised on the

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[1] See Report at paras. 184-194.

actions of a few cable operators.[2]

Therefore, the key point that I wish to emphasize is that we should promote competition among video providers rather than adopt broad-based cable reregulation. I firmly believe that a robust competitive marketplace, rather than reregulation, will more adequately address concerns over cable rates and service. Moreover, these steps have the benefit of allowing cable growth in terms of new programming and other services.

Given the appropriate incentives, including access to programming and a lessening of certain municipal regulatory barriers, I am hopeful cable communities will become more competitive. Cable overbuilders, MMDS operators, SMATV systems and in the longer term DBS operations should provide the competitive spur needed to correct many of the current competitive imbalances and consumer service problems. Promotion of these competitive services would be the most balanced method to ensure fair rates and quality service from the cable industry without stifling the overall growth of that industry. I cannot overemphasize my goal that the news and entertainment programming that cable television has been able to bring to American homes should not be impeded. Rate regulation has the potential to do just that; whereas competition adds even more diversity and consumer choice to the local video marketplace.

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[2] I note that the Report we adopt today does contain a recommendation that some provision be made to exclude good actors from the regulatory constraints of rate reregulation. However, in the absence of cost data, I query whether it is possible to accurately define a "good actor" standard under such a scheme.

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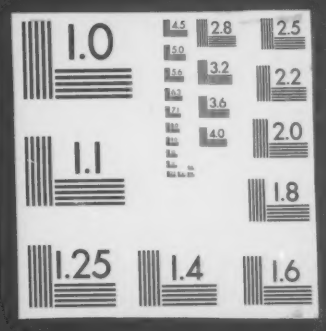
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